FILE COPY

Supreme Court, U.S.
F
OC
JAN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 472

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*,

v.

MICHIGAN CONSOLIDATED GAS COMPANY, MICHIGAN WISCONSIN PIPE LINE COMPANY, AMERICAN LOUISIANA PIPE LINE COMPANY, ET AL., *Respondents*.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RAYMOND N. SHIBLEY
Paterson, Belknap & Earnest
1129 Connecticut Ave., N. W.
Washington 6, D. C.

G. B. RUDOLPH
Baker & Daniels
810 Fletcher Trust Building
Indianapolis 4, Indiana

Attorneys for Panhandle Eastern Pipe Line Company, Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Pertinent Statutes and Regulations	4
Statement	4
Reasons for Granting the Writs	12
I. The Court of Appeals Was Without Power to Remand This Case on the Issue of the Settlement Proposal and Require Hearings Thereon	12
1. The Court of Appeals Was Without Jurisdiction to Consider the "Settlement Proposal"	13
2. The Commission Lacked Jurisdiction to Consider the "Settlement Proposal"	15
II. An Agency's Findings in an Opinion Denying Rehearing May Not Be Stigmatized as Insufficient to Support the Agency's Action for the Sole Reason That They Were Advanced After the Original Decision	18
Conclusion	21
Appendices	
Appendix I (Opinion of the Court of Appeals in Nos. 14975, *et al.*, decided April 29, 1960)	1a
Appendix II (Opinion of the Court of Appeals denying rehearing, filed July 11, 1960)	34a
Appendix III (Opinion and order of the Federal Power Commission in Docket Nos. G-10296, *et al.*, issued December 19, 1958)	38a
Appendix IV (Opinion and order of the Federal Power Commission denying applications for rehearing)	53a

Page

Appendix V (Opinion of the Court of Appeals in No. 15558, decided July 11, 1960) ... 73a

Appendix VI (Opinion and order of the Federal Power Commission) ... 83a

Appendix VII (Pertinent Statutes and Regulations) ... 88a

CASES CITED

Cia Mexicana De Gas v. FPC, 167 F. 2d 804 (5th Cir. 1948) ... 19

Federal Power Commission v. Colorado Interstate Gas Co., 348 U.S. 492 ... 14

NLRB v. Seven-Up Bottling Company, 344 U.S. 344 ... 14

Panhandle Eastern Pipe Line Co. v. FPC, 324 U.S. 635 ... 14

Panhandle Eastern Pipe Line Co. v. FPC, 204 F. 2d 925 (3d Cir. 1953) ... 5

Panhandle Eastern Pipe Line Co. v. FPC, 236 F. 2d 289 (3d Cir. 1956) ... 5

Panhandle Eastern Pipe Line Co. v. FPC, 219 F. 2d 729 (3d Cir. 1955), *cert. denied*, 349 U.S. 945 ... 6

Pan American Petroleum Corp. v. FPC, 268 F. 2d 827 (10th Cir. 1959) ... 15

Texas Gas Transmission Co. v. Shell Oil Co., 80 S.Ct. 1122 ... 13

United States v. Robinson, 80 S.Ct. 282 ... 16

Universal Camera Corp. v. NLRB, 340 U.S. 474 ... 20

ORDERS AND OPINIONS OF THE FEDERAL POWER COMMISSION

American Louisiana Pipe Line Co., Opinion No. 276 (October 1, 1954) ... 6

American Louisiana Pipe Line Co., 26 F.P.C. 575 ... 7, 8

Panhandle Eastern Pipe Line Co., In the Matter of, 11 F.P.C. 575, aff'd., 11 F.P.C. 167 (1952) ... 5

Panhandle Eastern Pipe Line Co., In the Matter of, Docket Nos. G-1116, *et al.*, decision issued April 19, 1955, aff'd., by order issued June 7, 1955 ... 5

STATUTES AND REGULATIONS

Page

Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, 15 U.S.C. § 717 *et seq.* (1958)

15 U.S.C. § 717r(a) 4, 15, 18
15 U.S.C. § 717r(b) 4, 13, 14

Federal Power Commission, Rules of Practice and Procedure, 18 C.F.R., Chap. I, Part 1

18 C.F.R. § 1.18 ..... 4, 17
18 C.F.R. § 1.33 ..... 4, 18
18 C.F.R. § 1.34 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*

v.

MICHIGAN CONSOLIDATED GAS COMPANY,
MICHIGAN WISCONSIN PIPE LINE COMPANY,
AMERICAN LOUISIANA PIPE LINE COMPANY,
COUNTY OF WAYNE, MICHIGAN,
MILWAUKEE GAS LIGHT COMPANY,
WISCONSIN FUEL AND LIGHT COMPANY,
NATURAL GAS DISTRIBUTORS, INC.,
STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN,
CITY OF DETROIT,
WISCONSIN PUBLIC SERVICE CORPORTION,

Respondents

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Panhandle Eastern Pipe Line Company, respectfully petitions this Court to grant writs of certiorari to review decisions of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia Circuit, not yet officially reported, are *Michigan Consolidated Gas Company, et al.* v. *Federal Power Commission, et al.*, Nos. 14,975, 14,976, 14,977, 15,061, 15,065, 15,070, 15,073, 15,074, 15,077, 15,093 and 15,144, decided April 29, 1960 (reprinted as Appendix I, *infra*, p. 1a); the opinion denying rehearing *en banc*, filed July 11, 1960 (reprinted as Appendix II, *infra*, p. 34a); and *Michigan Consolidated Gas Co.* v. *Federal Power Commission, et al.*, No. 15,358, decided July 11, 1960 (reprinted as Appendix V, *infra*, p. 77a). The Court of Appeals' decisions reversed the orders of the Federal Power Commission in *American Louisiana Pipe Line Company*, 20 F.P.C. 575 (1958) (reprinted as Appendix III, *infra*, p. 38a), rehearing denied, 21 F.P.C. 218 (1959) (reprinted as Appendix IV, *infra*, p. 53a), and *American Louisiana Pipe Line Co.*, decided June 16, 1959 (reprinted as Appendix VI, *infra*, p. 83a) and remanded the cases to the Federal Power Commission for further proceedings not inconsistent with its opinions.

JURISDICTION

The judgment of the Court of Appeals in Nos. 14,975, 14,976, 14,977, 15,061, 15,065, 15,070, 15,073, 15,074, 15,093, and 15,144 was entered on April 29, 1960. A timely petition for rehearing *en banc* was denied on July 11, 1960. The judgment of the Court of Appeals in No. 15,358 was entered on July 11, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1958).

QUESTIONS PRESENTED

1. Whether a United States Court of Appeals has the power under 15 U.S.C. § 717r (1958) to remand a case to the Federal Power Commission on the ground that the Commission must hold further hearings and consider a "settlement proposal" advanced by the losing party to the proceeding before the Commission where:

   (a) Protracted evidentiary hearings had been held and concluded, and a final order entered, *prior* to the tender of the "settlement proposal;"

   (b) The proposal was not urged in the losing party's petition for rehearing before the Commission and was advanced for the first time five days *after* the time for filing a petition for rehearing had passed;

   (c) The proposal would require a substantial modification of the Commission's decision.

   In other words: whether the courts may circumvent, and indeed nullify, the plainly expressed intent of the Congress that proceedings before regulatory agencies shall be governed by strict rules which require the orderly termination of such proceedings and do not permit parties to prolong such termination indefinitely by filing unauthorized documents (in this case denominated "settlement proposal") *after* expiration of the time fixed by statute for filing petitions for rehearing has passed.

2. Whether a United States Court of Appeals may make a determination that a particular finding by

the Federal Power Commission cannot of itself support one of its conclusions, on the *sole* basis that the finding appeared only in the Commission's opinion denying rehearing and not in its original opinion.

PERTINENT STATUTES AND REGULATIONS

Because the provisions involved are lengthy, only their citation will be given at this point. Their pertinent text is set forth in Appendix VII to this petition, *infra*, p. 88a *et seq.*

Natural Gas Act of June 21, 1938, c. 556, § 19(a), (b), 52 Stat. 831, 15 U.S.C. § 717r(a), (b) (1958).

Rules of Practice and Procedure of the Federal Power Commission, 18 C.F.R., Part 1, Chapter I.

18 C.F.R. § 1.18 (1949).
18 C.F.R. § 1.33 (1949).
18 C.F.R. § 1.34 (1949).

STATEMENT

This case involves a dispute between Panhandle Eastern Pipe Line Company (Panhandle) and Michigan Consolidated Gas Company (Michigan Consolidated) over whether the public convenience and necessity permitted Panhandle to discontinue certain deliveries of natural gas to Michigan Consolidated some ten years after the contract between the parties expired. The Federal Power Commission, after one of the longest hearings in its history, permitted Panhandle to discontinue the service, but the United States Court of Appeals for the District of Columbia Circuit reversed the Commission and remanded the case for hearings not inconsistent with its opinion.

Panhandle is an independent pipeline company which produces, purchases and transports natural gas to more than sixty non-affiliated distributors in Texas, Kansas, Missouri, Illinois, Indiana, Michigan and Ohio. Michigan Consolidated is a subsidiary of the American Natural Gas Company (American Natural), a holding company which wholly owns the largest natural gas-distributing companies in Michigan and Wisconsin, Michigan Consolidated and the Milwaukee Gas Light Company. American Natural also wholly owns two long-distance pipelines—the Michigan Wisconsin Pipe Line Company (Michigan Wisconsin) and the American Louisiana Pipe Line Company (American Louisiana)—in order to provide gas to its distributor subsidiaries.

Beginning in 1935, Panhandle entered into contracts with Michigan Consolidated to supply the latter with natural gas in the amount of 127,000 Mcf per day, as last amended. The contract expired on December 31, 1951. In 1951, Panhandle sought a reduction in its deliveries to Michigan Consolidated based on the greater need of its other distributors and on various expansion proposals of American Natural's pipeline subsidiaries which were believed to more than meet American Natural's need for gas and free Panhandle to supply its other distributors whose need was greater. After protracted proceedings before the Commission and the Third Circuit, Panhandle's request for reduction was denied,[1] but the ultimate denial in 1956 was

[1] *In the Matter of Panhandle Eastern Pipe Line Company*, 11 F.P.C. 375, affirmed, 11 F.P.C. 167 (1952); *Panhandle Eastern Pipe Line Company* v. *FPC*, 204 F. 2d 925 (3d Cir. 1953); *In the Matter of Panhandle Eastern Pipe Line Company*, Docket Nos. G-1116, *et al.*, decision issued April 19, 1955, affirmed by order issued June 7, 1955; *Panhandle Eastern Pipe Line Company* v. *FPC*, 236 F. 2d 289 (3d Cir. 1956).

expressly without prejudice to Panhandle's renewal of its application for abandonment when Michigan Consolidated began to receive the benefits of American Natural's continuing expansion.

The present application of Panhandle to discontinue service to Michigan Consolidated was granted by the Commission on December 19, 1958 in the following circumstances. In 1955, the Third Circuit had approved the Commission's grant to American Louisiana of a certificate of public convenience and necessity to construct a pipeline from Louisiana to Detroit having a capacity of 300,000 Mcf per day.[2] In respect to the allocation of this new gas supply, American Louisiana proposed to sell 200,000 Mcf per day to Michigan Consolidated and 100,000 Mcf per day to Michigan Wisconsin. While awaiting the outcome of the allocation proceedings which were complicated by Midwestern Gas Transmission Company's (Midwestern's) proposal to serve central Wisconsin markets with Canadian gas, which proposal was mutually exclusive with Michigan Wisconsin's proposal for service to that area, the Commission after various proceedings allocated 240,115 Mcf per day of American Louisiana's 300,000 Mcf per day capacity to Michigan Consolidated and those existing and potential Michigan Wisconsin customers which Midwestern did not propose to serve, reserving 59,885 Mcf per day for possible future allocation to the new Wisconsin markets.

When Panhandle filed its present application to discontinue service to Michigan Consolidated, American Louisiana had already filed an application to expand

[2] *American Louisiana Pipe Line Company*, Opinion No. 276 (October 1, 1954), affirmed, *Panhandle Eastern Pipe Line Company v. FPC*, 219 F. 2d 729 (3d Cir. 1955), cert. denied, 349 U.S. 945.

its 300,000 Mcf per day capacity pipeline from Louisiana to Detroit by 57,000 Mcf per day. After the hearing examiner, in June of 1958, recommended approval of American Louisiana's expansion application and denial of Panhandle's abandonment application, the Commission, in October of 1958, affirmed the trial examiner with respect to the American Louisiana expansion application, but reserved decision on the abandonment application.

On October 31, 1958, the Commission concluded the allocation proceeding, above described, between Michigan Wisconsin and Midwestern in the so-called Midwest Omnibus case, and rejected the proposals of both companies on the ground of economic and technical infeasibility.[4]

On December 19, 1958, the Commission reversed the hearing examiner and approved Panhandle's abandonment application. At the same time it allocated to Michigan Consolidated the 57,000 Mcf per day granted in American Louisiana's expansion application and also allocated to Michigan Consolidated the previously reserved 59,885 Mcf per day which, as a result of the above described Midwest Omnibus case, was now available for allocation. Thus, the Commission provided a replacement supply for the gas Panhandle had previously delivered to Michigan Consolidated.

Michigan Consolidated, among others, filed a timely petition for rehearing of the Commission's December 19, 1958 decision. Five days *after* the statutory time for filing a petition for rehearing had passed, Michigan Consolidated filed a "settlement proposal," ambiguous

[4] *American Louisiana Pipe Line Co.*, 20 FPC 575, 592, 604 (1958).

in its terms, but treated by the Court of Appeals as proposing in substance that Panhandle supply Michigan Consolidated with the same annual volume of gas as at present, but do so during the off-peak periods, thus affording Michigan Consolidated the opportunity of storing that gas for use for its peak day demands and freeing Panhandle from its peak day obligations to Michigan Consolidated. The proposal was not urged or even mentioned in Michigan Consolidated's petition for rehearing and was not acceptable to Panhandle which, along with its various non-affiliated distributors, and several state regulatory commissions, opposed the proposal. In a lengthy opinion denying rehearing of its decision of December 19, 1958, the Commission considered the proposal to the extent of obtaining the views of the parties to the proceeding, and then found that the new proposal would require a complete modification of its prior order and was inconsistent therewith.

1. The Opinions of the Federal Power Commission[1]

The opinions of the Federal Power Commission quite simply found that the public convenience and necessity permitted discontinuation of Panhandle's deliveries to Michigan Consolidated because the need for gas was greater along Panhandle's system than along that of American Natural (App. III, *infra*, pp. 42a-43a, 48a-50a). In so finding, the Commission also decided that the replacement gas allocated to Michigan Consolidated in place of the gas it would lose as a result of Panhandle's discontinuation of service was sufficient for the needs of American Natural (App. III, *infra*, pp.

[1] *American Louisiana Pipe Line Company*, 20 F.P.C. 575 (1958) (App. III, *infra*, p. 38a), rehearing denied, 21 F.P.C. 218 (1959) (App. IV, *infra*, p. 53a).

45a-48a), and that there were certain advantages to be gained from a separation of all relationship between these two natural gas systems (App. III, *infra*, p. 59a).

In its original opinion, the Commission illustrated the greater need for gas along the Panhandle system by comparing the space heating saturation[4] of Michigan Consolidated with that of Panhandle's customers—a test described by the Commission as "an objective way to approach this problem." (App. III, *infra*, p. 49a). Using the year 1958, the Commission found that 54.67% of Michigan Consolidated's residential and commercial customers used natural gas for space heating whereas only 50.4% of comparable Panhandle customers were able to obtain gas for that purpose.

In its opinion denying rehearing, the Commission reaffirmed its finding of Panhandle's greater need for the gas and used an independent and alternative test to evaluate the comparative needs—the "capacity-demand" ratio.[5] Michigan Consolidated was found to have a capacity-demand ratio of 96%, whereas Panhandle's was only 83.5% (App. IV, *infra*, pp. 59a-60a).

2. The Opinions of the Court of Appeals[6]

The original opinion of the Court of Appeals began with the premise that the present or future public convenience or necessity would permit a discontinuation of Panhandle's gas deliveries to Michigan Con-

[4] Space heating saturation refers to the percentage of residential and commercial customers who use gas for space heating. The higher the percentage, according to the criterion, the less is the need for the gas.

[5] This test showed the extent to which each system could meet the peak day demands of its customers, expressed in terms of percentages.

[6] Appendices I and II, *infra*, pp. 1a, 34a.

solidated if the three determinations used by the Commission were valid: (1) The gas supply in question could be used to greater advantage by customers of Panhandle than by customers of American Natural; (2) That each system would more efficiently procure gas supplies and serve its own customers if separated from the other; and (3) That there was sufficient unallocated gas on the American Natural system to replace the supply that Michigan Consolidated would lose by the abandonment order (App. I., *infra*, pp. 16a-17a).

The Court, however, found that a remand was necessary because of its disagreement with the Commission's calculation of relative space heating saturations, previously explained. The Court found that the saturation figures for Michigan Wisconsin's customers, as well as for those of Michigan Consolidated, should have been included in the calculation, whereas only Michigan Consolidated's customers were included. In a brief encounter with the record, the Court deduced that by the inclusion of Michigan Wisconsin's other customers, whose average space heating saturation it calculated to be 35%, the 54.76% space heating saturation attributed to Michigan Consolidated might be considerably lower.[5] (App. I, *infra*, pp. 20a-21a). The Commission

[5] The Court's 35% space heating saturation figure for Michigan Wisconsin's customers proved to be significantly erroneous. Only by excluding all of Michigan Wisconsin's customers outside the State of Wisconsin could such a figure be arrived at. The average space heating saturation for all of Michigan Wisconsin's customers was 47.45%. This crucial error of fact was recognized by the Court when on July 7, 1960 an order was entered which deftly toneped up the opinion by inserting "in Wisconsin" after "customers" in the next to the last full sentence of page 24 of its slip opinion. No intimation was given why the Michigan Wisconsin customers outside of Wisconsin were excluded from the Court's tally, or what the effect of the Court's error was on its conclusion to remand the case to the Commission.

in its opinion on rehearing had conceded that the space heating saturation of Michigan Wisconsin's customers was indeed relevant but in the circumstances not controlling, and proceeded to illustrate its overall conclusion of Panhandle's greater need by the above described capacity-demand ratio test. (App. IV, *infra*, pp. 59a-60a). Faced with the problem of two independent alternative Commission tests, both apparently supporting its basic finding of need, and one of which it disagreed with, the Court of Appeals refused to pass on the validity of the capacity-demand ratio test, finding that such test did not alone support the finding of Panhandle's greater need on the basis of the following theory:

> "Because the capacity-demand test was advanced after the Commission's original decision, it would appear that the Commission did not view it as a ground which alone would support the finding of greater need. Hence, even if this comparison were unassailable, a remand is required by our holding that the space heating comparison is fatally defective." (App. I, *infra*, p. 24a).

The Court's opinion denying rehearing is primarily devoted to a justification of its consideration of the Michigan Consolidated "settlement proposal" and is discussed more fully in the "Reasons for Granting the Writs."

On July 11, 1960, the Court of Appeals rendered its opinion and entered its judgment in *Michigan Consolidated Gas Co. v. Federal Power Commission, et al.*, No. 15,358, not yet officially reported (App. V, *infra*, p. 77a). This case sought review of the Commission's decision and order rendered June 16, 1959 (App. VI, *infra*, p. 83a), approving Panhandle's proposal to dis-

tribute 157,000 Mcf of gas among its resale customers. Of this volume, 127,000 Mcf was gas available to Panhandle as a result of the abandonment case. Because of its disposition of the abandonment case, the Court of Appeals found as to the 127,000 Mcf that the case should be remanded to the Commission for an interim allocation of the gas based on physical, financial, and equitable considerations, pending the outcome of the remand in the abandonment case.

REASONS FOR GRANTING THE WRITS

I.

THE COURT OF APPEALS WAS WITHOUT POWER TO REMAND THIS CASE ON THE ISSUE OF THE SETTLEMENT PROPOSAL AND REQUIRE HEARINGS THEREON.

The question of whether the Federal Power Commission is required to consider a "settlement proposal" in the circumstances of this case is of evident importance to the need for finality of decisions in the entire realm of federal administrative adjudication. Permitting a losing party, after decision by the agency and after the time for rehearing has passed, unilaterally to advance proposals inconsistent with the agency's decision and requiring complete modification thereof, and which would automatically require further consideration and presumably further hearings, if the consideration is to be an informed one, opens the door to possibilities for procrastination which are literally infinite. The decision and opinions of the Court of Appeals have so far departed from the mandatory jurisdictional requirements placed on both itself and the Federal Power Commission by the Congress as to call for an exercise of this Court's power of supervision.

During the past term this Court in *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 80 S.Ct. 1122 (1960), a natural gas case involving the Federal Power Commission, stated that it was particularly moved to grant certiorari in the case because of the contention that the Court of Appeals had improperly limited the appropriate scope of judicial review of the Power Commission's determination. A clearer case for the exercise of this Court's discretion is presented where the contention is that the Court of Appeals has exceeded its statutory jurisdiction as circumscribed by the Congress in the governing Federal Power Commission decision.

The Court of Appeals Was Without Jurisdiction to Consider the "Settlement Proposal"

Michigan Consolidated's "settlement proposal" was outside the jurisdiction of the Court of Appeals because it was not urged before the Commission in the application for rehearing of the Commission's December 19, 1958 abandonment order. Assuming *arguendo* that the Commission had jurisdiction to consider the proposal, its consideration by the Court of Appeals was prohibited by Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), which provides in pertinent part:

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. . . ."

Michigan Consolidated's application for rehearing the December 19, 1958 abandonment order did not contain any reference to the matter revealed for the first time in its untimely "settlement proposal," which

was filed five days after the time to petition for rehearing had passed. This Court has uniformly enforced the salutary policy enunciated in Section 19(b) by holding that a United States Court of Appeals is precluded from considering argument not urged in a timely petition for rehearing before the Commission. *Panhandle Eastern Pipe Line Company* v. *FPC*, 324 U.S. 635, 649 (1945); *NLRB* v. *Seven Up Bottling Co.*, 344 U.S. 344, 350 (1953); *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498 (1955).

Michigan Consolidated's procedural device to circumvent the Congressional intent and policy expressed in Section 19(b) should not be countenanced by this Court. When the Commission rejected the untimely "settlement proposal" in its February 13, 1959 opinion denying rehearing, Michigan Consolidated filed a petition for rehearing within thirty days after the Commission's opinion denying rehearing. The Court of Appeals in its opinion denying rehearing held that this second petition of Michigan Consolidated for rehearing conferred jurisdiction on the Court of Appeals to consider the "settlement proposal" in connection with the abandonment order.

This maneuver results in a plain evasion of the mandate of Section 19(b). While Michigan Consolidated's review petition in the Court of Appeals in No. 15,144 purported to seek review of the Commission's order of February 13, 1959 rejecting the untimely "settlement proposal," it was the order of December 19, 1958 permitting abandonment which constituted Michigan Consolidated's real and only grievance; it was that order which effectively denied Michigan Consolidated the continued involuntary deliveries of natural gas by Panhandle. The "settlement proposal" sought the

exact opposite of what the Commission had originally ordered: it sought continuation of the involuntary gas deliveries. When the substance of Michigan Consolidated's "settlement proposal" is considered, the February 13, 1959 Commission order rejecting the proposal amounted to a denial of a motion to vacate the Commission's original December 19, 1958 decision. In similar circumstances, the Court of Appeals for the Tenth Circuit recently stated in *Pan American Petroleum Corp. v. FPC*, 268 F. 2d 827, 830 (10th Cir. 1959):

> "To permit a dissatisfied party to challenge an order of the Commission in that manner more than thirty days after the entry of such order would effectively circumvent the requirement contained in section 19, supra for the filing of an application for rehearing within the thirty-day period as a prerequisite to judicial review."

It is apparent that by the filing of any kind of motion relating to a previous original decision more than thirty days after the original decision and then filing a timely petition for rehearing of the adverse Commission action on the untimely motion, new and limitless vistas for dilatory action are opened for bringing matters before the Court of Appeals which were not urged in a timely petition for rehearing of the original decision.

2. The Commission Lacked Jurisdiction to Consider the "Settlement Proposal"

The organic statute of the Federal Power Commission in its provision for rehearings, 15 U.S.C. 717r(a) states in pertinent portion:

> "Any person . . . aggrieved by an order issued by the Commission . . . may apply for a rehearing within thirty days after the issuance of such order.

> The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing . . ."

The Commission certainly went as far as it jurisdictionally could go when, in its opinion on rehearing, it did, contrary to the assertion of the Court of Appeals (App. I, *infra*, p. 33a n.), consider the untimely "settlement proposal" to the extent of finding that it was inconsistent with its prior order and would require substantial modification thereof (App. IV, *infra*, p. 51a).

During the past term, this Court had occasion to point out to the United States Court of Appeals for the District of Columbia Circuit that a statutory ten-day limit for filing a notice of appeal in a criminal case meant that a criminal case could not be entertained by the Court of Appeals if no notice of appeal was filed within ten days. *United States* v. *Robinson*, 80 S. Ct. 282 (1960). The Court spoke of the indefinite delay which would result from a judicial lack of adherence to the mandatory time limits of the statute. The Court concluded: "Certainly that possibility [indefinite delay] would unnecessarily produce intolerable uncertainty and confusion. Whatever may be the proper resolution of the policy question involved, it was beyond the power of the Court of Appeals to resolve it." 80 S. Ct. at 288-89 (footnote omitted). This Court's holding that a criminal defendant must file a notice of appeal within ten days after judgment in compliance with the statutory requirement applies with far greater impact to a large corporate party to a complex and protracted administrative case who unilaterally unfolds a proposal inconsistent with and re-

granting a drastic modification of the agency's decision after the statutory period of sixty days has passed in which such objections might be voiced. Absent a timely petition for rehearing in which this proposal was urged, the Commission was powerless to act on Michigan Consolidated's proposal, unless the plainly expressed Congressional intent is to be disregarded.

The Court of Appeals in its opinion denying rehearing sought justification for its order that the Commission consider on the merits Michigan Consolidated's "settlement proposal" by citing a Rule of Practice and Procedure of the Commission which provides: "Nothing contained in this section shall be construed as precluding any party to a proceeding from submitting at any time offers of settlement or proposals of adjustment to all parties and to the Commission . . ." 18 C.F.R. § 1.18(c) (1949). The Commission's Rule, of course, may not be construed, in derogation of the organic statute, to require so-called settlement proposals filed after the time for rehearing has passed to be considered by the Commission, thus making the finality of agency decisions depend only on the imagination of counsel for the losing party to devise additional pleadings to obstruct indefinitely a conclusion to a case. Moreover, the rule cannot be construed to require positive Commission action when the plain words specify only that submission of such settlement proposals are not precluded.

The fact is that Michigan Consolidated sought to reopen the record, but since the Commission had issued its final order, that avenue of attack was foreclosed by the Commission's Rules of Practice and Procedure governing petitions to reopen.[1] By designating its

[1] 18 C.F.R. § 1.23 (1949).

pleading a "proposal." Michigan Consolidated sought to do indirectly what it could not do directly—reopen the proceedings. The Court of Appeals has sanctioned this circumvention. Viewed realistically, Michigan Consolidated's proposal was simply a rearguard harassment which received the fullest Commission consideration possible under the mandate of Section 19(a) of the Act.

II.

AN AGENCY'S FINDINGS IN AN OPINION DENYING REHEARING MAY NOT BE STIGMATIZED AS INSUFFICIENT TO SUPPORT THE AGENCY'S ACTION FOR THE SOLE REASON THAT THEY WERE ADVANCED AFTER THE ORIGINAL DECISION.

A recurring problem in the judicial review of administrative cases is posed when the agency makes two independent and alternative findings, each of which supports a single ultimate determination, and a reviewing court disagrees with one of the two findings. That problem arose in this case when the Commission supported its finding of the Panhandle system's greater need for the gas by the above-described space heating saturation test in its original opinion and by the above-described capacity-demand ratio test in its opinion denying rehearing. In neither opinion did the Commission attribute a "controlling" significance to either or both of these tests. Indeed, in its opinion denying rehearing, the Commission expressly disclaimed that it had given controlling significance to the space heating saturation test (App. IV, *infra*, p. 58a).

The Court of Appeals disagreed with the calculation which was used in applying the space heating saturation test,[10] finding it to be the controlling consideration

[10] The petitioner's position with respect to this portion of the Court's holding is expressed in footnotes 8, *supra*, p. 10.

of the Commission, and was of the opinion that it did not need to pass on the validity of the capacity-demand ratio test because that test was found in the opinion denying rehearing, and for that sole reason was insufficient to support the finding of Panhandle's greater need (App. I, *infra*, p. 24a[11]).

If this Court sanctions and accepts the Court of Appeals' mechanistic approach to the findings of an administrative agency, the curative function of rehearings is *pro tanto* atrophied. The reason for rehearings in administrative agencies is to give the agency an opportunity to review its previous action in the light of objections to it and to give additional or alternative reasons for its action, or to change its findings and order if, on rehearing, it is of a different mind.[12] There would be little, if any, reason for agencies to entertain rehearing petitions if their findings in opinions denying rehearing, "even . . . if unassailable,"[13] can not be given controlling significance, and of themselves recognized as supporting the agency's action. If purported error in an alternative finding in the original opinion is held to require a remand automatically, and no finding appearing in an opinion denying rehearing can be given controlling significance, the curative effect of rehearings has been terminated by an oblique judicial fiat.

Certainly a closer qualitative analysis of the two tests than was vouchsafed by the Court of Appeals

[11] In *Cia Mexicana De Gas v. FPC*, 167 F. 2d 804 (5th Cir. 1948), the Court, after recognizing that the Commission could change its findings on rehearing stated: "If it does so change, our function on a review of its findings and order is to determine not which of the two findings and orders was the best but whether, as claimed by petitioners, the findings and order under review are without evidence to support them." 167 F. 2d at 810.

[12] App. I, *infra*, p. 24a.

was required to determine whether either of these findings were grounds which alone would support the finding of greater need. The relative physical location of the two independent and alternative findings in the Commission's opinions occupies the lowest rung in any such qualitative analysis.

An added consideration is the effect of the Court of Appeals' differentiation between findings in an original opinion and in an opinion denying rehearing on the "substantial evidence" rule governing the review of decisions of administrative agencies, authoritatively clarified by this Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474. There, this Court held that an agency's action was to be upheld if supported by "substantial evidence" on the record as a whole. Upon this unambiguous holding the Court of Appeals in the instant case has engrafted the following qualification: except that part of the record disclosed by the Commission in its opinion denying rehearing. Those findings, according to the logic of the Court of Appeals' ruling, even if based upon "substantial evidence," do not and cannot support a Commission's action simply because they were advanced after the original decision.

This distinction between findings in an original opinion and in an opinion denying rehearing is wholly without warrant or precedent and can lead only to an abandonment of the rehearing process, an encroachment on the statutory "substantial evidence" rule, and a corresponding material increase in the litigative burden of the agencies stemming from the increased flow of remands from the United States Courts of Appeals.

CONCLUSION

It is respectfully urged that writs of certiorari be issued directed to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

RAYMOND N. SHIBLEY
Patterson, Belknap & Farmer
1128 Connecticut Ave., N. W.
Washington 6, D. C.

G. R. RICHARDS
Baker & Daniels
810 Fletcher Trust Building
Indianapolis 4, Indiana

Attorneys for Panhandle Eastern Pipe Line Company, Petitioner

APPENDIX I

UNITED STATES COURT OF APPEALS

[OR, FOR DISTRICT OF COLUMBIA CIRCUIT]

No. 14975

MICHIGAN CONSOLIDATED GAS COMPANY, A CORPORATION,
PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT
PANHANDLE EASTERN PIPE LINE COMPANY
MICHIGAN GAS UTILITIES COMPANY, ET AL.
CENTRAL ILLINOIS LIGHT COMPANY
MICHIGAN GAS STORAGE COMPANY
CITY OF INDIANAPOLIS, INDIANA
NORTHERN INDIANA FUEL & LIGHT CO.
SOUTHEASTERN MICHIGAN GAS CO.
CITIZENS GAS FUEL COMPANY
MISSOURI POWER & LIGHT COMPANY
MISSOURI PUBLIC SERVICE COMPANY
CENTRAL ILLINOIS PUBLIC SERVICE COMPANY
ILLINOIS POWER COMPANY
ILLINOIS COMMERCE COMMISSION
MISSOURI PUBLIC SERVICE COMMISSION
PUBLIC SERVICE COMMISSION OF INDIANA
INDIANA GAS & WATER COMPANY, INC.
INTERVENORS

No. 14976

MICHIGAN WISCONSIN PIPE LINE COMPANY, A CORPORATION,
PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
PANHANDLE EASTERN PIPE LINE COMPANY
MISSOURI PUBLIC SERVICE COMPANY
CENTRAL ILLINOIS PUBLIC SERVICE COMPANY
INTERVENORS

On Petitions to Review Orders of
the Federal Power Commission

Decided April 29, 1960

Before BAZELON, WASHINGTON and BURGER, *Circuit Judges*.

BAZELON, *Circuit Judge*: This proceeding is another encounter in a long running battle between Panhandle Eastern Pipe Line Company ("Panhandle") and American Natural Gas Company ("American Natural") the dominant corporations in two of the largest natural gas systems serving the Midwest.[1] Their difficulties arose shortly after Panhandle and American Natural's subsidiary, Michigan Consolidated Gas Company ("Michigan Consolidated") entered into a contract in 1935 which, as amended, required Panhandle, an interstate natural gas transportation company, to furnish Michigan Consolidated, a local gas utility serving Detroit and environs, with 127,000 Mcf of natural gas per day.[2] The orders of the Federal Power Commission here

[1] The disputes before the courts alone are chronicled in the following fifteen cases, cited in abbreviated form:

Panhandle v. *F.P.C.*, 83 U.S.App.D.C. 297, 169 F.2d 881, *cert. denied*, 335 U.S. 854 (1948); *Michigan Consolidated* v. *Panhandle*, 173 F.2d 784 (6th Cir. 1949); *Panhandle* v. *Michigan Consolidated*, 177 F.2d 942 (6th Cir. 1949); *Panhandle* v. *Michigan Consolidated*, 117 F.Supp. 551 (E.D. Mich. 1953); *Panhandle* v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947); *Panhandle* v. *Michigan Public Service Commission*, 341 U.S. 329 (1951); *Michigan Consolidated* v. *F.P.C.*, 203 F.2d 893 (3d Cir. 1953); *Panhandle* v. *F.P.C.*, 204 F.2d 675 (3d Cir. 1953); *Panhandle* v. *F.P.C.*, 204 F.2d 925 (3d Cir. 1953); *Panhandle* v. *F.P.C.*, 219 F.2d 729 (3d Cir.), *cert. denied*, 349 U.S. 945 (1955); *Michigan Consolidated* v. *Panhandle*, 226 F.2d 60 (6th Cir. 1955), *cert. denied*, 350 U.S. 987 (1956); *Panhandle* v. *F.P.C.*, 232 F.2d 467 (3d Cir.), *cert. denied*, 352 U.S. 891 (1956); *Panhandle* v. *F.P.C.*, 236 F.2d 289 (3d Cir. 1956); *Memphis Light* v. *F.P.C.*, 100 U.S.App.D.C. 205, 243 F.2d 628 (1957); *Michigan Consolidated* v. *F.P.C.*, 246 F.2d 904 (3d Cir.), *cert. denied*, 355 U.S. 893 (1957).

[2] Mcf is the standard abbreviation for thousand cubic feet. All volumes referred to in this opinion are on a daily basis.

under review, promulgated after one of the longest hearings in the history of the commission, granted Panhandle the right to abandon this service.

I. Background

The gas delivered under the 1935 agreement originally constituted Michigan Consolidated's sole supply of natural gas. But Panhandle's deliveries failed to keep pace with the growth of the Detroit market and by 1945, Michigan Consolidated was forced to turn to other sources.[1] It organized through its parent, American Natural, two interstate pipe lines—Michigan Wisconsin Pipe Line Company ("Michigan Wisconsin") and American Louisiana Pipe Line Company ("American Louisiana")—to bring gas to the Great Lakes area from Texas and Louisiana. Each of these companies now sells some gas to Michigan Consolidated for resale in the Detroit area; the balance is sold through Michigan Wisconsin to local utility companies, for resale in their respective markets.[2]

Panhandle obtains gas from both independent producers and its own large reserves in Texas, Oklahoma and Kansas. Its pipe line extends from these gas fields to northern termini in Michigan. Panhandle sells its gas in the intervening states to two main classes of customers: (1) independent local utilities (some 60 in number) who resell primarily, but not exclusively, to domestic and commercial space heating consumers; (2) industrial customers who use the gas as industrial fuel. Significantly, the sale of gas to utilities for resale is subject to the regulatory jurisdiction

[1] On August 7, 1959, this court stayed the effective date of the Commission's order until after oral argument. On October 2, 1959, one day after the argument, we permitted the stay order to dissolve and the abandonment order to take effect but cautioned that these cases present "serious and substantial questions" and that the parties "act at their own risk" until final disposition of the case.

[2] With one exception, Milwaukee Gas Company, these utilities are not affiliated with the American Natural system.

of the Commission; sales made directly to industrial customers are not.

There are strong indications that one of Panhandle's primary purposes in seeking abandonment is to shift gas from regulated to unregulated sales. According to the Commission, "at least part of the trouble [between Panhandle and Michigan Consolidated] seems to have arisen from competition [between them] to serve industrial customers in the Detroit area." Another factor, which clearly appears from the "chronicle of [the] disputes and litigation," is Panhandle's failure to enlarge its pipeline capacity to satisfy the great demand for natural gas in its market area. Many of Panhandle's resale customers are operating under severe shortages which prevent them from serving many would-be customers. Moreover, the rising demand of the presently-attached customers has forced many of these utilities to manufacture artificial gas at a cost much greater than the price of natural gas.

Michigan Consolidated charges, and the Commission agrees, that Panhandle's failure to expand implements its deliberate aim to avoid the Commission's rate regulations. Evidence of this policy is said to be found in the following: (1) Panhandle's large volume of unregulated sales to industrial and Canadian customers; (2) Panhandle's announced desire to keep its gas reserves in the ground, except insofar

---

Natural Gas Act, § 1 (b), 52 Stat. 821 (1938), 15 U.S.C. § 717 (b) (1958); *Panhandle Eastern Pipe Line Co. v. Federal Power Comm'n*, 324 U.S. 635 (1945).

Interstate Natural Gas Co., 20 F.P.C. 531, 532 (1958).

Ibid.

The Commission's brief says: "Petitioners' objections, as a practical matter, embodies Panhandle's cumulative dissatisfaction with [FPC] regulation of its rates, its deliberate policy not to extend its capacity in pace with the growth of its resale markets, and its refusal to build its gas reserves under FPC regulation. Note to Conclusion of Commission Counsel's Brief in Respondent [illegible]

as they can be utilized for unregulated sales, until the rate ceilings on presently regulated sales are lifted;[1] and (3) Panhandle's vigorous efforts before the Commission, including the present proceedings, to divert more gas from utility to industrial customers.

The present proceeding is not Panhandle's first attempt to abandon service to Michigan Consolidated. In 1951, when their contract expired, Panhandle sought permission to reduce its deliveries. This request was denied on the ground that Michigan Consolidated needed the gas more than Panhandle's other utility customers.[2] The denial was ultimately sustained by the United States Court of Appeals for the Third Circuit in 1956.[3] Its opinion stated, however, that Panhandle would be free to renew its application for abandonment "if and when" Michigan Consolidated obtained gas from American Louisiana—the second major transporta

[1] During the course of the hearings, staff counsel asked a Panhandle executive:

"... is it a fact that Panhandle Eastern never intends to file any expansion program until they can get a fair field price for their gas? ... Isn't that what Panhandle is holding out for?"

The witness answered:

"... I think that it would be safe to say that Panhandle would want a commensurate rate for its company-produced gas, whether that was arrived at by a fair field price method or some cost method that might be developed.

"If it got what it considered a fair value for its company-produced gas, that would certainly be influential in encouraging the management and the board of directors to consider further expansion of the company's facilities."

In *City of Detroit v. Federal Power Comm'n*, 97 U.S.App.D.C. 260, 230 F.2d 810 (1955), *cert. denied*, 352 U.S. 829 (1956), this court held that Panhandle's actual cost and not the prevailing field price must be used, at least at a point of departure, in fixing rates.

[2] *Panhandle Eastern Pipe Line Co.*, 11 F.P.C. 167 (1952).

[3] *Panhandle Eastern Pipe Line Co. v. Federal Power Comm'n*, 236 F.2d 289 (3d Cir. 1956).

tion pipe line built by Michigan Consolidated's parent, American Natural.

II. The Instant Proceedings

The present abandonment proceedings grow out of American Louisiana's application for a certificate of public convenience and necessity to construct a thirty-inch pipeline from Louisiana to Detroit. The line's capacity was to be 300,000 Mcf per day, two thirds of which American Louisiana proposed to sell to Michigan Consolidated and one third to Michigan Wisconsin.[1]

Panhandle intervened in opposition to the project, claiming that, as a supplier for the Detroit market, it would be adversely affected by the proposed sale to Michigan Consolidated. The Commission set the American Louisiana construction application for hearing in proceedings known as "Docket G-2306" and granted a certificate.[2] Upon review in 1955 the Court of Appeals for the Third Circuit affirmed.[3] At that point there only remained the task of allocating American Louisiana's gas.

Hearings in Docket G-2306 were resumed in December of 1955 for the purpose of allocation. At these proceedings Michigan Wisconsin requested gas to meet the increased demands of the utility customers it was already serving as well as gas to supply a number of previously unserved Wisconsin communities through proposed pipe line exten-

[1] *Id.* at 264.

[2] *American Louisiana Pipe Line Co.*, Opinion No. 276 (Oct. 1, 1954) (unreported).

[3] *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 219 F.2d 729 (3d Cir. 1955). Both the Court's and the Commission's opinions, *supra* note 13, pointed out that there is a "crying demand" for additional gas in the midwest area; that Panhandle had "evinced no interest" in attempting to meet this demand; and that the 200,000 Mcf of gas which American Louisiana proposed to sell to Michigan Consolidated was needed to supplement, not displace, the 127,000 Mcf supplied by Panhandle.

sions. Allocation to Michigan Wisconsin for this latter purpose was complicated, however, by the fact that Midwestern Gas Transmission Company ("Midwestern") had also filed an application to construct a pipeline to serve a number of the same new Wisconsin markets with Canadian gas. Since the Midwestern and Michigan Wisconsin construction applications were mutually exclusive, a comparative hearing was required to determine which proposal would best serve the public interest.

Instead of awaiting the outcome of the necessarily lengthy comparative hearing between Michigan Wisconsin and Midwestern, the Commission immediately allocated 240,115 Mcf of American Louisiana's 330,000 Mcf capacity in order to meet the requirements of Michigan Consolidated and those existing and potential Michigan Wisconsin customers which Midwestern did not propose to serve. The remaining 89,885 Mcf of American Louisiana's capacity was reserved for possible future allocation to the new Wisconsin markets. This amount, the Commission found, "safely exceeds any reasonable requirements for new markets."

Before permanent allocation of its initial capacity was completed, however, American Louisiana filed an application for a certificate of public convenience to increase its capacity by 57,500 Mcf. In order to have this badly needed gas available for the winter (1956-57), the Commission issued a temporary, emergency certificate authorizing immediate construction and operation. Shortly thereafter, Panhandle intervened in opposition to American Louisiana's expansion application and simultaneously filed an application to abandon totally its deliveries to Michigan Consolidated.

American Louisiana Pipe Line Co., 15 FPC 23, 34 (1956). The order accompanying this opinion reserved 79,690 Mcf for new markets, but subsequent orders authorizing service to communities which were not competitive with Midwestern's application reduced the volume of reserve gas to 59,885 Mcf per day. 16 FPC 897 (1956); 17 FPC 300 (1957); 17 FPC 665 (1957).

The Commission thus had before it three separate applications concerning the American Natural system: (1) Michigan Wisconsin's proposal to build a pipeline to serve the new Wisconsin communities with the previously reserved 59,885 Mcf of American Louisiana's initial capacity, (2) American Louisiana's application to expand its capacity by 57,000 Mcf, and (3) Panhandle's request to Abandon service to Michigan Consolidated. The Commission chose to process the three applications in two proceedings. The first was the previously ordered comparative hearing between Michigan Wisconsin and Midwestern. The second was a consolidated hearing on the American Louisiana expansion and the Panhandle abandonment.

After lengthy hearings in the expansion abandonment case, the Examiner, in June of 1968, issued his decision, granting American Louisiana a permanent certificate for its proposed expansion, and denying Panhandle's abandonment application. He found that if the Panhandle deliveries to Michigan Consolidated were withdrawn the American Natural system would not have sufficient gas to meet its customers' needs. In October the Commission affirmed the Examiner with respect to the American Louisiana expansion, but reserved decision on the abandonment application.

In the meantime, the comparative hearings between Midwestern and Michigan Wisconsin in the so-called "Midwest omnibus" case were completed. On October 31, 1968, the Commission rejected both proposals on the grounds that they lacked economic or technical feasibility. The Commission found, however, that the Central Wisconsin area was still in need of gas and invited the parties to submit revised proposals. But it also noted that its earlier reservation of 59,885 Mcf of American Louisiana gas was not for all times, and did not mean that "should demands on the part of existing markets become of greater import,

---

* *American Louisiana Pipe Line Co.*, 29 F.P.C. 575, 592 (1963).

ance in the public interest the new Wisconsin markets . . . must be forever favored . . . ."[7]

Six Weeks later, on December 19, 1968, and without acting upon the proposals incited in the Mid-west omnibus case, the Commission issued its decision in the abandonment case. It authorized Panhandle to abandon totally its deliveries to Michigan Consolidated; and to replace the abandoned Panhandle service, it allocated to Michigan Consolidated both the 57,000 Mcf of American Louisiana's expanded capacity and the 59,885 Mcf of its original capacity previously reserved for new markets.[8] However, the Commission's order rejected Panhandle's proposed plan of distribution for the 127,000 Mcf of abandonment gas on the ground that it would have made some gas available to Panhandle for direct sales to industrial customers. Panhandle was therefore directed to present a new allocation plan which would "provide that the gas should be sold for resale primarily to domestic and commercial [space heating] consumers."[9]

Michigan Consolidated, its affiliates in the American Natural system, and some of their customers filed applications for rehearing. Shortly thereafter, Michigan Consolidated also submitted a settlement proposal pursuant to the Commission's rules of practice.[10] The proposal contemplated that Michigan Consolidated, which has large underground storage facilities in the Great Lakes area, would purchase the same *annual* volumes from Panhandle

[7] *Id.* at 604.

[8] 20 FPC 851 (1958). Commissioner Kline noted that he would only allow partial abandonment. *Id.* at 858.

[9] *Ibid.*

[10] 18 C.F.R. § 1.18 (1968). That section establishes a pre-hearing procedure to expedite proceedings and to provide an opportunity for settlement. Subsection (c) provides that: "Nothing contained in this section shall be construed as precluding any party to a proceeding from submitting *at any time* offers of settlement or proposals of adjustment to all parties and to the Commission . . . ." (Emphasis supplied.)

as at present but would do so during off-peak periods. This would allow Panhandle to use its maximum daily capacity, including the 127,000 Mcf, to meet the peak day demands of other customers in its market area for winter space heating.

On February 13, 1959, the Commission denied all of the applications for rehearing, and refused to consider Michigan Consolidated's plan "whatever its virtues" because it was inconsistent with the Commission's order and unacceptable to Panhandle and some of its customers.[4] The Commission's order also rejected Panhandle's revised plan for allocating the abandonment gas among its resale customers because (1) is failed to show how much of the abandonment gas would be made available to space heating customers, and (2) it proposed to allocate the abandonment gas to utility customers who were less in need of gas than Michigan Consolidated. The Commission thereupon postponed the effective date of the abandonment order and set a hearing for June 16, 1959, at which "properly interested parties could present plans and evidence with respect to the disposition of Panhandle's gas . . . ." But the Commission added that members of the American Natural system and their customers were not "such parties" and would thus be excluded from the hearing.[5]

These eleven consolidated petitions for review[6] challenge

[4] *American Louisiana Pipe Line Co.*, 21 F.P.C. 218 (1959).

[5] *Id.* at 227. Commissioner Kline concurred in the denial of a rehearing, but stated that he was still of the view that the public interest would be better served by partial abandonment. Commissioner Connole dissented from the denial of a rehearing insofar as it precluded consideration of the settlement proposal.

Ibid.

[6] Michigan Consolidated, its two affiliates in the American Natural System (Michigan Wisconsin and American Louisiana), three customers (two present and one potential) of Michigan Wisconsin, and three governmental units challenge the abandonment orders. In addition, the Wisconsin Public Service Corporation appeals, in No. 15983, from an order of the Commission which denied it leave to intervene in the abandonment case because its

three related orders of the Commission: (1) the December 23, 1958 order authorizing the abandonment and allocating American Louisiana's gas to Michigan Consolidated; (2) the February 13, 1959 order denying rehearing, summarily rejecting the proposed settlement, and excluding the American Natural system and its customers from further proceedings involving disposition of the abandonment gas; and (3) an order, issued during the course of the hearings, affirming the Examiner's exclusion of certain evidence.

III. The Criteria for Abandonment

1. The statute: Petitioners assert that the Commission rested its action on an erroneous construction of § 7(b) of the Natural Gas Act. That section provides that "No natural-gas company shall abandon all or any portion of its facilities [or service] subject to the jurisdiction of the Commission" without Commission approval based on a finding, after due hearing, either (1) that the supply of gas is depleted, or (2) that "the present or future public convenience or necessity permit such abandonment." [2] Panhandle sought and the Commission approved total abandonment solely upon a finding in accordance with the second provision.

The fact that abandonment of public service requires Government approval symbolizes the special legal status

action was filed more than thirty days after the original abandonment order. Michigan Consolidated also appeals, in No. 15144, from the Commission's denial of a rehearing of its February 13 order which denied rehearing of the abandonment order. Michigan Consolidated apparently feared that its exclusion from the further proceedings which the Commission ordered to determine a plan of allocation for the abandonment gas might be construed as a substantive order, and it sought rehearing in order to preserve its right to judicial review under § 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), as amended, 15 U. S. C. 717r (b) (1958).

Panhandle, eleven of its customers, three state commissions and a municipality all intervened in support of the Commission.

[2] 52 Stat. 824 (1938), 15 U. S. C. 717f (b) (1958).

and obligations of common carriers and public utilities. This includes an obligation, deeply embedded in the law, to continue service. When Panhandle sought and obtained a certificate of public convenience and necessity to serve the Detroit market, it became the exclusive supplier for that market. If it wants to abandon service because it must now share that market, or because it prefers to use that gas for more profitable unregulated sales, or because it wants to be rid of what it considers a vexatious servitude, these are not reasons for granting its request. Abandonment may be allowed only if "the public convenience or necessity permit." And the word "permit," instead of "require," does not shift the burden to those opposing the application. An applicant for abandonment under § 7(b) of the Act has the burden of making the factual showing which will assure the Commission, charged with protecting the public interest, that that interest will in no way be disserved; just as the applicant under § 7(c) for a certificate to commence service must bear the burden of proving that that public interest will be served."

2. *The Commission's rationale.* Our responsibility for determining whether the Commission properly concluded that the public interest would not be jeopardized by abandonment is hampered at the outset. For the Commission's opinions in this case are not models of clarity as to the standards it applied in determining that the "public convenience and necessity permit such abandonment." In its original opinion the Commission said:

> An appropriate standard is set forth in our [previous] Opinion . . . denying partial abandonment where we said that Panhandle had "made no showing that the needs of the consuming public served by these other customers for natural gas are *greater than, or as great as*, the needs of the consuming public in the areas served by Michigan Consolidated and Michigan Wis-

[1] *See Atlantic Refining Co. v. Public Service Comm'n*, 360 U. S. 378, 391 (1959).

cessation in the event of the "attack of Natural" or no showing "of benefit to the consuming public along the Panhandle system [and a] weighing of the injury and damage to the consuming public served by the other systems."

The Commission's starting point in applying this "appropriate standard" was a finding that "there is either no gas available from the capacity of American Louisiana's pipeline that has not been permanently allocated . . . to [or] not abandoned at without depriving Michigan Consolidated or the American Natural System of gas allocated to them other than on a temporary basis." This conclusion was based, in part, on statistics showing that, even without Panhandle, the American Natural system had enough (but barely enough) gas on an annual basis to meet the past demands of its presently attached loads. The Commission nonetheless recognized that "the record contains extensive projections on the needs of both the American Natural . . . and Panhandle . . . systems for additional supplies of gas. An objective way to approach this problem," said the Commission, "is to compare the [heating saturation of Michigan Consolidated's . . . with the heating saturations of the customers of Panhandle . . . ." Finding that in most Panhandle customers heated with gas it ordered the abandonment.

In rehearing the Commission proceeded to have shifted its ground. It declared that under the statute "abandonment is

[illegible] 361 U.S. at 534 quoting from *Panhandle Eastern Pipe Line Co.*, 11 F.P.C. 167, 171-72 (1952). Emphasis supplied.

[illegible] 361 U.S. at 536.

The Commission found that Michigan Natural's annual requirements under 362,278 for May of 1963 [illegible] to 260,595,197 Mcf. . . . Thus, said the Commission, "it is clear enough . . . that the deliveries can be made under the [illegible] contract." *Id.* at 536.

Id. at 537. Heating saturation [illegible] to be [illegible]

will be permitted unless it is to act with the public convenience and necessity." In reaching this conclusion, said the Commission, "the standards mentioned there and in our previous order were but partial criteria used in reaching a result within the language of the statute." Utilizing this broadened test, the Commission recognized the relevance of at least two factors militating against abandonment—the added costs to Michigan Consolidated and the unconsidered needs of Michigan Wisconsin customers. But it concluded that "whatever detriments there may be to Michigan Consolidated . . . and Michigan Wisconsin' . . . consumers," they were outweighed by the "great demands for service on Panhandle's system." Panhandle's greater need was further demonstrated by a comparison of each system's ability to supply its customers on days of maximum demand. Finally the Commission averted to the advantages of separating the two systems as another factor supporting abandonment.[8]

Although the Commission's rationale is not altogether clear to us, we are able to glean from its opinions three ultimate determinations upon which it rested the abandonment and allocation orders: (1) that the gas supply in question could be used "to greater advantage" by Panhandle's customers than by the customers of American

[8] 21 F.P.C. at 221

21 F.P.C. at 220

21 F.P.C. at 221

In its parting shot the Commission summed up thus:

> "In applying the standard of the Act all of the considerations referred to in this order and in our prior order were weighed. Certainly the needs of Panhandle's customers for the gas coupled with the general considerations expressed in our previous order and again referred to below with respect to the relations between the two systems and their place in the natural gas industry show that the public convenience and necessity require such abandonment." 21 F.P.C. at 222.

Natural; (2) "that each system will more efficiently procure gas supplies and serve its own customers if separated from the other one;" and (3) that there was sufficient unallocated gas on the American Natural system to replace the supply which Michigan Consolidated would lose by the abandonment order.

If valid, these determinations are sufficient to establish that "the present or future convenience and necessity permits . . . abandonment." Petitioners contend, however, that these determinations are fatally defective. We shall discuss their objections to each.

IV. The Finding of "Greater Need"

Recognizing that the demand for gas in both the American Natural and Panhandle market areas far exceeded the available supplies, the Commission made three comparisons in order to determine which system could utilize the gas to better advantage. We shall refer to them as the "heating saturation" test, the "capacity-demand ratio," and "the considerations of economic burden."

1. *Comparative space heating saturations.* This test, upon which the Commission relied most heavily, purported to assess relative need by determining the percentage of existing residential and commercial consumers on each sys-

Despite some language to the contrary, we find that the Commission actually relied upon its finding that the gas could be used to *greater* advantage on the Panhandle system. Hence it is unnecessary for us to consider petitioners' argument that the Commission misconstrued the statute by suggesting that the public interest would "permit" abandonment if the needs of Panhandle's customers were only *as great as* the needs of Michigan Consolidated's.

21 FPC at 227.

We do not decide whether these determinations are also sufficient to support the allocation of American Louisiana's unsold capacity to Michigan Consolidated. Petitioners have not raised the applicability of § 7 (c) and we do not reach the question.

tom who use gas for space heating purposes. This percentage is called the "space heating saturation." [1] Applying its formula to the facts in the record, the Commission found that, in 1958, 54.6 percent of Michigan Consolidated's residential and commercial consumers utilized natural gas for space heating, while only 50.4 percent of comparable Panhandle consumers bought gas for that purpose. (The remaining customers presumably utilized gas only for cooking, hot water and similar purposes). The Commission concluded from this disparity that Panhandle had the greater need.

Petitioners' first objection to the heating saturation test is that the Commission adopted an erroneous basis of comparison. They contend that in computing Panhandle's average saturation, the Commission should not have included the very low saturation (16 percent) of one customer that is primarily interested in reselling to industrial, as distinguished from space heating, consumers, and that the Commission should not have excluded from the computation the high saturations of two other Panhandle customers on the ground that they had another source of supply. Since the purpose of the comparison was to determine relative needs among those who might obtain the gas, and since the Commission stated that it would not allocate any of the abandonment gas to the two customers with high saturations and an alternate supply, we think their saturations were properly eliminated. Conversely, the saturation of the customer with only a 16 percent saturation was properly included since it might have been allocated gas on the condition that it be resold to non-industrial users.

Petitioners' second allegation of erroneous comparison, however, is well taken. As they point out, the Commission

[1] "By dividing the number of heating customers by the total number of residential and commercial customers, a percentage figure is obtained which represents heating saturation." 20 FPC at 557. According to this test, the lower the percentage saturation, the greater the need.

originally announced that "appropriate standard" for determining whether the public interest permitted abandonment required a comparison of the needs of "the consuming public along the Panhandle system" with "the needs of the consuming public in the areas served by Michigan Consolidated *and Michigan Wisconsin*." [20] In implementing this standard, however, the Commission actually compared the Panhandle saturation with that of Michigan Consolidated alone. When this inconsistency was called to its attention, the Commission, in its opinion denying rehearing, stated:

> Also relevant, but not controlling, is the need for additional gas on the systems of Michigan Wisconsin's distributors, some of whom have comparatively low space heating saturations. While we have carefully considered the problems of these companies, the space heating saturation of Michigan Consolidated, which is being directly deprived of the Panhandle gas and the advantages of separating the two systems have greater weight [21 F.P.C. 218, 221.]

We think that the Commission erred in excluding the Michigan Wisconsin distributors from the space heating saturation test. It is clear that "If the requirements of the public interest are to be satisfied, the Commission must consider not only the public benefit . . . but also any public loss . . . ." *Democrat Printing v. Federal Communications Commission*, 91 U.S.App.D.C. 72, 75, 202 F.2d 298, 301 (1952). As the Commission itself recognized in the first abandonment case:

> Panhandle says that it has no obligation to the public served by distributors supplied by the Michigan Wisconsin pipeline other than Michigan Consolidated. But the considerations of the public convenience and necessity in testing the abandonment are not restricted to that portion of the public living in Detroit, and include, certainly, the impact on other areas as well. [*Panhandle Eastern Pipe Line Company*, 11 F.P.C. 167, 169 (1952).]

[20] 20 F.P.C. at 854, emphasis supplied

Viewed realistically, abandonment has a substantial "impact" upon consumers in the areas served by Michigan Wisconsin's utility customers. It is these distributors who are actually being deprived of gas as a result of abandonment, for under the Commission's orders Michigan Consolidated is a conduit through which the unallocated gas on the American Natural system flows to Panhandle's customers. This is so because Michigan Consolidated is ultimately not deprived of any gas. Its entire loss is to be replaced with the American Louisiana unallocated capacity. True, Michigan Consolidated might well have obtained some of the replacement gas, even if abandonment had been denied, but it is equally clear that significant quantities would still have been left for use by Michigan Wisconsin's existing, if not potential, customers. The interest of those customers in attaching new loads and meeting other future demands while "not controlling" should have been fairly reflected in the space heating saturation figures by which the Commission measured the impact of abandonment on the American Natural system. This is required for at least two reasons: (1) by using the unallocated gas to replace Michigan Consolidated's lost supply, the Commission has made Michigan Wisconsin's and Panhandle's use of this gas, as a matter of economic fact, mutually exclusive, *Delta Airlines v. CAB*, 97 U.S.App.D.C. 46, 54, 228 F.2d 17, 22 (1955); and (2) if the unallocated American Natural gas is used to replace Michigan Consolidated's loss, the future needs of the Michigan Wisconsin consumers must be met by expensive expansion on the American Natural system. *City of Pittsburgh v. Federal Power Comm'n*, 102 U.S.App. D.C. 69, 250 F.2d 394 (1957).

Although the Commission concedes that the gas needs of these Michigan Wisconsin customers are "relevant," it failed to say *how much* an appropriate weighing of these Michigan Wisconsin saturations would reduce the Michigan Consolidated saturation of 54.67 percent. The record shows that the space heating saturations of Michigan Wisconsin's

existing customers ranged from a low of 27 percent to a high of 44 percent. The average was 35 percent. Thus, a sizeable market for attaching new loads existed. Since Panhandle's saturation of 50.4 percent is only 4.27 percent less than Michigan Consolidated's, even some weight to the Michigan Wisconsin figures might well have indicated a contrary result."

We are not unmindful that one of the two reasons the Commission gave for excluding Michigan Wisconsin's saturations from its comparison formula is that Michigan Consolidated was being "directly deprived of the gas." But in the circumstances of this case we think that a distinction between "direct" and "indirect" deprivation is without a difference. Such a distinction might have been relevant if Michigan Consolidated's loss to Panhandle were not replaced and the effect of abandonment were to reduce the level of service to Michigan Consolidated's presently attached customers. Although abandonment without replacement would have deteriorated Michigan Wisconsin's competitive claim for new gas on the American Natural system to the extent that it aggravated Michigan Consolidated's need for new gas, no existing Michigan Wisconsin consumers would have been cut off.[1]

[1] The Commission argues in its brief that, with the denial of American Louisiana's application in the Midwest expansion case to serve the new Wisconsin communities, Michigan Wisconsin lost its claim to any of the 59,885 Mcf of gas originally earmarked for its market. Furthermore only 55 percent of the 57,000 Mcf of "expansion gas" (or roughly 29,000 Mcf) had been temporarily allocated to Michigan Wisconsin, with the possibility that an even smaller amount might be permanently certificated. From this, the brief concludes that this 29,000 Mcf, which equals only 22 percent of the 127,000 Mcf which Panhandle attempted to abandon, would "plainly not warrant the use of Michigan Wisconsin's saturation for comparison *at anything like equal weight* to that of Michigan Consolidated . . . ." Brief for Respondent at 32. Even assuming the premises of this argument to be correct, the short answer is that the Commission gave these Michigan Wisconsin saturations no weight, or at least failed to tell how an appropriate weighing would affect Michigan Consolidated saturation.

But instead of considering the abandonment separately from the allocation of the free American Natural gas, the Commission chose to treat them together, and clearly indicated that it predicated the abandonment upon the availability of replacement gas. In this situation neither Michigan Consolidated nor Michigan Wisconsin were required to detach existing loads. Since each of them will feel the effect of the Commission's action only with respect to future demands for new service, Michigan Wisconsin's interest has not been shown to be less "direct" than Michigan Consolidated's for the Panhandle resale customers. It follows that Michigan Wisconsin's interest in attaching new loads to meet the demands of prospective customers was entitled to some demonstrable weight.[4]

Petitioners' final objection with respect to the saturation tests is this, even if the comparison were otherwise valid, a comparison of "unsifted averages" did not and could not show *how much* abandonment was necessary to equalize distribution. Consequently they contend that the Commission erred in ordering *total* abandonment based upon a system-wide comparison of average heating saturations rather than first determining which of Panhandle's customers would receive the abandonment gas and in what amounts. They point out that some of Panhandle's other customers have far higher saturations than Michigan Con-

[4] It is elementary that the ruling of an administrative agency cannot stand if the conclusion or an ultimate fact does not follow rationally from subsidiary facts. *Johnston Broadcasting Co. v. Federal Communications Comm'n*, 85 U.S.App.D.C. 40, 46, 175 F.2d 351, 357 (1949); *Capital Transit Co. v. Public Utilities Comm'n*, 87 U.S.App.D.C. 191, 205, 214 F.2d 176, 181, *cert. denied*, 348 U.S. 816 (1954); *The Slot Broadcasting Co. v. Federal Communications Comm'n*, 68 App.D.C. 295, 296, 96 F.2d 564, 567 (1938).

As the text indicates, we do not think that the determination of [illegible] can be read to require advantage on the Panhandle [illegible] to Michigan Consolidated and the Michigan Wisconsin customers flows automatically from a finding that Panhandle's customers need [illegible] more than Michigan Consolidated alone.

solidated, and some lower, and that, under the Commission's stated objective of fairly distributing natural gas, the abandonment gas will presumably be allocated only to Panhandle customers having lower saturations than Michigan Consolidated. Petitioners argue that the volume of gas necessary for such allocations may require only partial rather than total abandonment, and therefore the Commission cannot validly order total abandonment until these allocations are actually made. They also contend the Commission compounded its error by excluding them from the proceedings which it ordered to determine a suitable plan for allocating the abandonment gas among Panhandle's other customers.

We do not say that the Commission may never rest total abandonment on a comparison of needs based on system-wide averages rather than individual communities. But we do think that it cannot do so without a satisfactory explanation of the circumstances which were thought to require or justify it. The need for such an explanation is particularly pressing where, as here, a gas supply which would ordinarily have been available to certain communities is allocated to other communities in order to facilitate an abandonment and those deprived communities are not afforded an opportunity to show that such allocation does not constitute fair distribution.

2. *The respective demand ratios.* The Commission's second test of relative needs measured the ability of each system to meet the peak-day demands of its customers. The Commission found that American Natural was able to supply 80 percent of the gas contracted on its system on a peak day; Panhandle only 53.5 percent.[*] Petitioners contend that this

[*] These figures are obtained by dividing the maximum daily volumes which each system can make from its transportation and storage facilities by the total amount of gas contracted for on that system during a peak day. The ratio between consumption and supply is presumably not by any means the same as gas is generally more costly than natural gas.

be allocated to Michigan Consolidated. We agree that there is an inconsistency between certificating an expansion of the ground that it is needed by one market, and then permanently allocating the fruits of that expansion to another market. But we do not think this was beyond the authority of the Commission providing that it found, upon a valid comparison, that other markets were in *greater* need of the gas. The difficulty is, as we found earlier, that the Commission's comparison was not valid since it failed to accord proper consideration to the needs of Michigan Wisconsin's customers. Hence the determination of where this gas is needed most must await a proper comparison in further proceedings on remand."

2. *The extra pipeline gas:* This refers to gas which the Commission suggested would be available on the American Natural system if American Louisiana operated its "spare" compressors full time and continually obtained gas from the fields at maximum contract demands. There is some conflict in the testimony as to the prudence of this procedure in terms of safety and the adequacy of gas reserves. And it is not altogether clear that American Louisiana's contracts with its suppliers allow it to take its maximum volumes on a permanent basis. But we cannot say upon the record before us that the Commission's action was arbitrary or unsupported by substantial evidence."

of adequate service or to serve particular customers." Natural Gas Act § 7(e), 52 Stat. 824, 1938, 15 U.S.C. § 717f(e), 1958. But the Commission has no authority to issue a temporary certificate to serve new markets. *Algonquin Gas Transmission Co. v. Federal Power Comm'n*, 201 F.2d 331, 1st Cir. 1953.

A permanent certificate requires a finding *inter alia*, of adequate markets. The Commission, in granting the permanent certificate found an unsatisfied demand on the American Natural system including Michigan Wisconsin's existing customers 20 F.P.C. at 479.

The virtual direction to American Louisiana to expand should be compared to the Commission's flat denial that it had authority to force Panhandle to expand. The relevant statutory provision, § 7(e) of the Natural Gas Act, 52 Stat. 824, 1938, 15 U.S.C. § 717f(e), 1958, would appear to authorize the Commission after a proper hear-

3. *The reserve data.* This refers to the 59,553 Mcf of American Louisiana's initial capacity, originally reserved in Docket G-2306 for distribution to new Wisconsin markets in the event that Michigan Wisconsin prevailed in the Midwest omnibus case. The expansion-abandonment hearings proceeded on the assumption that the reserve gas was available for allocation only in Docket G-2306.[7] By the time the Commission rejected Michigan Wisconsin's proposal to serve the new communities, the expansion-abandonment hearings had terminated and the Examiner had rendered his report denying abandonment. Thereafter, the Commission took the gas reserved in Docket G-2306, and allocated it in those expansion-abandonment proceedings.

[7] to "direct a natural gas company to extend or improve its transportation facilities . . . if the Commission finds that no undue burden will be placed upon such natural gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities."

Relying on the proviso to this section, the Commission repeatedly asserts in its brief that it is "powerless to compel Panhandle to expand [its pipe line or storage facilities] in order to serve 'the public need for gas on its system.'" Brief for Respondent, pp. 2, 3. The Commission recognizes that "the existence of a more desirable alternative" is one of the factors which enters into a determination of whether a particular proposal would serve the public interest" and that the Commission's impotence "to command the alternative does not mean that it can not reject a proposal." *City of Pittsburgh v. Federal Power Comm'n*, 99 U.S. App. D.C. 113, 123, n. 28, 237 F.2d 741, 751, n. 28 (1956). But it has to do that would be "to cut off its nose to spite its face." Brief for Respondent, p. 29.

Without deciding this question, we merely note that the Commission's lack of authority to command an improvement of existing facilities may not be so clear-cut as it suggests. Compare *Michigan Consolidated Gas Co. v. Panhandle Pipe Line Co.*, 173 F.2d 754, 6th Cir. 1949, with *Panhandle Pipe Line Co. v. Federal Power Comm'n*, 201 F.2d 873, 3d Cir. 1953; *Michigan Consolidated Gas Co. v. Federal Power Comm'n*, 246 F.2d 901, 3d Cir. 1957; *Cocktail Gas Utilities Co. v. Federal Power Comm'n*, 247 F.2d 301, 3d Cir. 1957.

The Presiding Examiner expressly stated in his opinion that the Commission has granted [illegible]

Petitioners urge that this violates the *Ashbacker* rule[48] and elemental principles of procedural due process in two respects: (1) Those petitioners who were seeking gas for new markets and intervened only in Docket G-2306 suddenly found that the gas which had been reserved for disposition in those proceedings had been allocated in the abandonment case without notice to them or opportunity to be heard. (2) Other petitioners who had intervened only in these expansion-abandonment proceedings (mostly Michigan Wisconsin's existing customers seeking the expansion gas for their markets in Michigan and Wisconsin) were effectively precluded from asserting any claim to the reserve gas in any forum because they did not, and could not reasonably, anticipate that gas reserved for disposition in another proceeding would be allocated in this one *after* the hearing in this proceeding had terminated.

Although these contentions raise serious questions,[49] we need not decide them since the alleged lack of notice and hearing will perforce be remedied by the comparisons already required by this opinion on remand to the Commission.[50] In such proceedings, the Commission will, of course, be free to consider the extent to which needs of any of the communities requesting gas service from Michigan Wisconsin have been met or are likely to be met by other natural gas pipelines.[51]

---

[48] *Ashbacker Radio Corp.* v. *Federal Communications Comm'n*, 326 U.S. 327 (1945).

[49] See, *e.g.*, *Delta Airlines, Inc.* v. *Civil Aeronautics Board*, 97 U.S.App.D.C. 46, 51, 228 F.2d 17, 22 (1955); *Delta Airlines, Inc.* v. *Civil Aeronautics Board* (No. 14789, decided Dec. 10, 1959).

[50] Since we are remanding the case for further proceedings, we shall dismiss the petition of Wisconsin Public Service Corp., No. 15093, without prejudice, and without deciding whether petitioner was entitled to judicial review under § 19 (a) of the Natural Gas Act, notwithstanding its tardy petition for rehearing. 52 Stat. 831, 15 U.S.C. § 717r (a) (1958). See note 24, *supra*.

[51] Panhandle has argued that any injury which the petitioners representing new markets may have sustained as a result of the Commission's decision to allocate the reserve gas in the abandon-

VI. The Advantages of Total Separation

We come now to the last of the three basic determinations upon which the Commission predicated its order.

The Commission's opinions make it abundantly clear that it considered total separation of these warring giants a major benefit[*] and relied upon it as an element of the public interest supporting abandonment.[**]

---

ment case, is now moot, for these same communities will shortly obtain Canadian gas from another supplier. After argument we invited the parties to submit supplemental briefs on this issue. It appears that on October 31, 1958 the Commission approved a combined Midwestern-Michigan Wisconsin application to serve the same Wisconsin communities as Michigan Wisconsin originally proposed to serve with the reserve gas. But petitioners contend that, despite Commission approval, the project may not reach completion as it requires the approval of Canadian authorities to export the gas, and financing at favorable rates. Conversely, petitioners urge us to notice that Panhandle has filed an application for a rate increase which, if approved, will provide it with the incentive to expand enormously its present capacity.

We express no opinion on the relevance of either of these proposals. Upon the remand we order, the Commission will be at liberty to consider what effect, if any, these and other proposals in various stages of fruition may have upon whether the public interest permits Panhandle's abandonment.

[*] The Commission mentioned these benefits in the concluding passages of both its original and rehearing opinions: "Moreover, with the separation for which we are providing both Panhandle and Michigan Consolidated should be in a stronger and in an independent position." 20 F.P.C. at 558. "It is our opinion that each system will more efficiently procure gas supplies and serve its own customers if separated from the other one." 21 F.P.C. at 227.

At the point in its rehearing opinion where it disclaimed reliance upon a single standard, the Commission said:

> In applying the standards of the Act all of the considerations referred to in this order and in our prior order were weighed. Certainly the needs of Panhandle's customers for the gas coupled with the general considerations expressed in our previous order and again referred to below *with respect to the relations between the two systems and their place in the natural gas industry* show that the public convenience and

It is not clear, however, what the Commission thought these benefits were. The Commission said several times in its opinions that total separation would make each system more "efficient" and "stronger." But it failed to make clear whether this efficiency and strength would be achieved by the termination of controversy or from some other consequence of total abandonment.

Petitioners argue that it was the termination of controversy upon which the Commission relied. They contend that this was improper because the Commissioner affirmed

---

necessity "permit" such abandonment. [21 F.P.C. at 222 (emphasis supplied).]

In discussing the proper weight to give the space heating saturations of Michigan Wisconsin's customers, it stated:

> While we have carefully considered the problems of these companies, the space heating saturation of Michigan Consolidated, which is being directly deprived of the Panhandle gas *and the advantages of separating the two systems* have greater weight. [21 F.P.C. at 221 (emphasis supplied).]

Finally, in the section of its rehearing opinion, entitled "Conclusions on Rehearing," the Commission said:

> It may be true, as contended, that we have never before permitted an abandonment of service over the protests of the buyer, but here we have a peculiar situation where one of two great rival natural gas systems is required to serve the other. This situation has been subject to our regulatory authority for some time as indicated in our prior order. Up to the present time because of shortage of gas supplies we have been unwilling to permit the abandonment. Now because of American Louisiana's increased capacity and the availability of the gas reserved in Docket No. G-2306, *et al.*, abandonment has become feasible .... [21 F.P.C. at 226-27.]

Commissioner Kline also understands the Commission to rely heavily upon the advantages of separating the American Natural and Panhandle systems. In his concurring opinion on rehearing, where he explains why he favors only partial abandonment, he says: "The majority are of the view that the benefits which will accrue to the public by reason of the complete severance of relations between the two systems outweigh other aspects of the public interest." 21 F.P.C. at 228.

the Examiner's exclusion of evidence relating to the origins of and reasons for the controversy, saying:

> "... we are fully aware of the fact that there is a long history of controversy between the parties, but *we find nothing in the Act setting forth the existence of controversy as a basis for permitting natural gas service to be abandoned.* If such a basis could be found in the law, the issue herein would have long since been resolved."[1]

Assuming, as petitioners argue, that the Commission relied upon the termination of controversy as a ground for ordering total abandonment, we cannot agree that the exclusion of this evidence necessarily precluded the Commission from such reliance. The Commission could nonetheless find a proper basis for its action in its great knowledge of the controversies, derived from the mountains of records amassed by these antagonists over many years in previous cases before it. Based upon this experience, it might know, for example, whether the expenses and delays of litigation and the other social costs of the controversy have adversely affected quality and cost of service to the ultimate consumer. Such information is, of course, relevant to the question of whether the public convenience permits abandonment. Similarly, it may have an expert's knowledge that does not require evidence in the record that each system will be more efficient and stronger after abandonment.

But we think that, in these circumstances, the Commission cannot invoke particular knowledge, sight unseen, under the cloak of past experience. Instead it must reveal what this knowledge is and how it supports the conclusion for which it is invoked. Since it is by no means clear from this record that (1) abandonment will terminate the series

[1] *American Louisiana Pipe Line Co.*, 18 F.P.C. 571, 572 (1957). Emphasis supplied.

of controversies between the parties" or (2) that "each system would more efficiently procure gas supplies and serve its own customers if separated from the other one," the Commission's action cannot be sustained on this ground. *Federal Communications Comm'n* v. *RCA Communications*, 346 U.S. 86, 96-97 (1953).

VII. Settlement Proposal

We think the Commission also erred in its treatment of the settlement proposal filed by Michigan Consolidated and that the Commission must reconsider the matter upon the remand of this case.

This proposal was filed after the original abandonment order was issued, but before the petitions for rehearing were denied. Under this proposal the full 127,000 Mcf of abandonment gas would be available to Panhandle during the winter months to satisfy space heating needs of its domestic and commercial customers. In summer months, however, Panhandle would be required to continue its sales to Michigan Consolidated, and, indeed, to step up its rate of delivery so that the same annual volume would be supplied. Michigan Consolidated offered to store this summer gas in its large underground fields in order to have it available to meet the winter space heating needs of *its* domestic and commercial customers. Michigan Consolidated further charges that neither Panhandle nor its utility customers are presently capable of storing this volume of off-peak gas, so that it will either be sold directly to industrial customers (which Panhandle favors) or will remain in the field (which would mean that Panhandle's pipe line was not being used to capacity all year round). The Commission

[55] As petitioners point out, there is much evidence which suggests that separation will not terminate the controversies. The Commission tells us that: "At least part of the trouble seems to have arisen from competition to serve industrial consumers in the Detroit area." Yet Panhandle's application to abandon service candidly states that it intends to continue its efforts to capture industrial customers in the Detroit area. *See Panhandle Eastern Pipe Line Co.* v. *Michigan Public Utilities Comm'n*, 341 U.S. 329 (1951).

did not pass upon these charges, however, for it refused to consider the settlement proposal "whatever its merits," and excluded American Natural and its customers from the post-abandonment allocation proceedings.

Even assuming that under the Commission's rules Panhandle's rejection of the settlement rendered the proposal ineffective *as a settlement*, it could not, and we believe should not, have precluded the Commission from considering the proposal *on its merits*. Indeed, the proposal appears *prima facie* to have merit enough to have required the Commission at some stage of the proceeding to consider it on its own initiative as an alternative to total abandonment.[7] The consuming public with which the Commission is concerned—residential and commercial space heating users—require large uninterruptible supplies during the winter months, but little or no gas during the other months. The settlement proposal promises to fulfill the Commission's announced objectives of distributing gas to this consuming public on the basis of need, even more fully than total abandonment.

Of course, there may be valid objections to the settlement proposal which the Commission has not explained, or which a hearing upon the proposal would reveal. Such considerations may merit modification or total rejection of the proposal. But we think that, since the Commission is charged with the duty of protecting the ultimate consumer "from exploitation at the hands of natural gas companies," *Federal Power Comm'n* v. *Hope Natural Gas*, 320 U.S. 591, 610 (1944), it cannot refuse *to consider* a proposal which appears, on its face at least, consistent with that duty.

The Commission's order will be set aside and the case remanded for further proceedings not inconsistent with this opinion.

[7] *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *City of Pittsburgh* v. *Federal Power Comm'n*, 99 U.S.App.D.C. 113, 123 n. 28, 237 F.2d 741, 751 n. 28 (1956). See also *Clarksburg Publishing Co.* v. *Federal Communications Comm'n*, 96 U.S.App.D.C. 211, 225 F.2d 511 (1955); *Mansfield Journal Co.* v. *Federal Communications Comm'n*, 86 U.S.App.D.C. 102, 180 F.2d 28 (1950).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 14975, 14976, 14977, 15061, 15065, 15070, 15073, 15074, 15077, 15093, 15144

MICHIGAN CONSOLIDATED GAS COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISION, RESPONDENT

On Petition of Federal Power Commission for Modification of Opinion and Rehearing

---

Before: BAZELON, WASHINGTON and BURGER, Circuit Judges, in Chambers.

Filed July 11, 1960

MEMORANDUM DENYING FEDERAL POWER COMMISSION'S PETITION FOR MODIFICATION OF THE OPINION OR FOR REHEARING, AND WITH RESPECT TO JURISDICTIONAL POINT RAISED BY PANHANDLE PIPE LINE COMPANY IN ITS PETITION FOR REHEARING EN BANC

BAZELON, *Circuit Judge*: In its petition for rehearing in banc, which has been denied today by the court in banc, Panhandle argues that the Commission's action in rejecting Michigan Consolidated's settlement proposal was beyond this court's jurisdiction to review because the proposal was not included in a timely application for rehearing. The division of this court which heard this case deems it appropriate to comment upon this contention.

Panhandle's argument rests upon § 19 of the Natural Gas Act. Subsection (a) provides that "any person . . . aggrieved by an order issued by the Commission . . . may ap-

ply for rehearing within thirty days after the issuance of such order." And subsection (b) provides that "No objection to the order of the Commission shall be considered by the court [of appeals] unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so." 52 Stat. 831, 1938), 15 U.S.C. § 717r (1958). See *Federal Power Comm'n v. Colorado Interstate Gas Co.*, 348 U.S. 492 (1958).

On December 18, 1958, the Commission overruled the trial examiner's decision denying Panhandle's application and ordered total abandonment. Michigan Consolidated filed its settlement proposal on January 23, 1959—five days beyond the thirty-day period prescribed by § 19(a). We point out, however, that under the Commission's own regulations "any party [may submit] at any time offers of settlement or proposals of adjustment to all parties and to the Commission . . . ." 18 C.F.R. § 1.18 (1949). We think this may be construed to authorize the Commission to consider such filings *at any time* while the case is in its bosom. Quite evidently the Commission did so construe it, for the Commission did not reject the filing of Michigan Consolidated's offer on the ground that the proposal was not included in a time petition for rehearing. Instead, rejection was based on the ground that the offer was inconsistent with the Commission's order and unacceptable to Panhandle and some of its customers. This refusal was included in the Commission's opinion of February 23, 1959, denying rehearing. Within thirty days thereafter, Michigan Consolidated filed a petition for rehearing, seeking reconsideration of the Commission's action with respect to the settlement offer. The Commission rejected that petition by letter dated March 19, 1959;[1] Michigan Consolidated appealed from that action

[1] The letter stated that the petition was rejected because the Commission's order of February 23, 1959, had "discussed the proposal of Michigan Consolidated Gas Company without reaching

in No. 15144;[2] and the Commission conceded in its separate brief in that case that "petitioner properly invokes this court's jurisdiction under Section 19 of the Natural Gas Act."

The Commission, in its instant petition for modification or rehearing, makes no direct attack upon this court's jurisdiction, but it bitterly assails the court for "a clear intrusion into the area of the Commission's exclusive responsibility." It complains that it is:

> sheer madness to say that one of the contending companies could lie back with an alternative proposal until after the clock has struck, and then, wholly without warrant in the governing statutes or rules, ambush the Commission and force it to enter into another, new comparative hearing.

We are not persuaded by this and other such hyperbolic assertions by the Commission. We still think that in the special circumstances of this case, the Commission erred in brushing aside the settlement proposal on the grounds that it was unacceptable to Panhandle and inconsistent with the abandonment order. The proposal contained no surprises. The Commission knew, or should have known, from its files and records that Panhandle's resale customers could not use all of the abandonment gas during the summer months, and that Michigan Consolidated had fields in which it could store summer deliveries. These

any determination. Hence the application is not addressed to any affirmative action on the part of the Commission . . . ." While it is true that the Commission entered no formal findings or orders concerning the proposal, it clearly rejected it. Since the denial was administrative action which finally and adversely determined an important legal question, we think petitioner was entitled to petition for rehearing and to appeal. 52 Stat. 831 (1938), 15 U.S.C. § 717r (1958). Cf. *Sun Oil Co. v. Federal Power Comm'n*, 266 F.2d 222 (5th Cir. 1959), *affirmed*, 28 U.S.L. Week 4595 (June 27, 1960); *Algonquin Gas Transmission Co. v. Federal Power Comm'n*, 201 F.2d 334 (1st Cir. 1953).

[2] That appeal was consolidated with the others from the Commission's earlier orders.

matters, on their face, reflected the basis for an alternative to total abandonment, so apparently in the public interest, that their consideration at some point in the proceedings was indispensable to the validity of any public interest determination in support of total abandonment. In viewing the public interest, the Commission's vision is not to be limited to the horizons of the private parties to the proceeding.[3]

Where, as here, a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration. These limits are not to be confused with the narrower ones governing review of an agency's conclusions reached upon proper consideration of the relevant factors.

The petition is denied.

---

[3] See authorities cited in note 56 of the opinion.

APPENDIX III

UNITED STATES OF AMERICA
FEDERAL POWER COMMISION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole and Arthur Kline.

Docket Nos. G-10396, G-10400, G-11061

In the Matters of

AMERICAN LOUISIANA PIPE LINE COMPANY, GULF REFINING COMPANY, PANHANDLE EASTERN PIPE LINE COMPANY.

ORDER PERMITTING ABANDONMENT OF SERVICE AND ALLOCATING GAS SERVICE

(Issued December 19, 1958)

In our order issued October 10, 1958, in Docket Nos. G-10396 and G-10400, we issued a certificate of public convenience and necessity to American Louisiana Pipe Line Company (Am-La) for its "step one" compression facilities including the purchase lateral and related facilities in the West Little Chenier Field and to Gulf Refining Company for the sale of gas to Am-La from the same field. We deferred for further deliveration and consideration the application by Panhandle Eastern Pipe Line Company filed on September 10, 1956 in Docket No. G-11061 pursuant to section 7(b) of the Natural Gas Act to abandon service to Michigan Consolidated Gas Company, Am-La's customer and affiliate. By order issued December 8, 1958, we denied Panhandle's application for rehearing and reconsideration of our order of October 10, 1958. Panhandle's application for abandonment is now before us for disposal, and for the reasons set forth below we are granting Panhandle's application.

Since we are granting Panhandle's application, and are thus reducing the amount of gas available to Michigan Consolidated, it will be necessary for us to allocate gas transported by Am-La's pipeline which is now being delivered under temporary authorization in Docket No. G-2306[1] in order to enable Michigan Consolidated to meet the firm needs of its customers.

As will appear herein the abandonment of service by Panhandle to Michigan Consolidated is not inconsistent with the history of the relations between the companies and with our prior decisions and is supported by the present record. Gas was first introduced into the Detroit area in 1936, and at that time Panhandle was the principal source of supply to the distributing company, Michigan Consolidated. Service was rendered pursuant to the provisions of a contract dated August 31, 1935, as amended, covering delivery of volumes up to 125,000 Mcf per day for service to the Detroit area, and pursuant to the terms of a contract dated April 20, 1937, covering delivery of volumes of 2,000 Mcf per day for service to Ann Arbor, Michigan. Since the total 127,000 Mcf per day of gas was delivered at a 100% load factor, the annual quantity was 46,355,000 Mcf. Pursuant to their terms and notices given by Panhandle, the first contract expired on December 31, 1951, and the second contract on January 1, 1954. Since that time Panhandle has continued to deliver the full quantity of gas to Michigan Consolidated, but has made a previous attempt to abandon service in part (Docket No. G-1725) and has made the present attempt to abandon service altogether.

We have never contemplated that Panhandle would forever be bound to serve Michigan Consolidated. After grant

[1] In our Opinion No. 316 issued October 31, 1958, we reserved for future determination the permanent allocation of reserve gas involved in Docket Nos. G-2306 and G-2327 amounting to 50,855 Mcf per day. *American Louisiana Pipe Line Company, et al.*, 20 F.P.C. ____. Opinion No. 316, mimeo. page 50 paragraph M. See also order issued October 10, 1958 in the instant proceeding mimeo. pages 6 and 8.

ing a certificate for Michigan Wisconsin's pipeline in Docket No. G-669, 5 F.P.C. 953, we reopened the proceedings so as to consider the service rendered by Panhandle. We provided that Panhandle should be given the "opportunity" to deliver and sell gas to Michigan Consolidated in keeping with its pattern of service, but in our discussion said (*Michigan-Wisconsin Gas Co.*, 6 F.P.C. 58, 69, 70, 71, 74):

> "It also appears that Panhandle's growing markets in Missouri, Illinois, Indiana, Ohio and Michigan will require increased quantities of gas equal to or exceeding in amount the annual volumes of gas sold to Michigan Consolidated.
>
> • • •
>
> . . . the continuance of service to Michigan Consolidated should be in keeping with Panhandle's ability to render adequately such further service in the best manner possible, and with recognition of its obligations to meet the full demands on its system in Kansas, Missouri, Illinois, Indiana, Ohio, and Michigan."

Panhandle's attempt at partial abandonment and a brief history of the relations between Panhandle and the American Natural System are set forth by the opinion of the Court of Appeals for the Third Circuit issued July 25, 1956.[2] This history is a chronicle of disputes and litigation between the two systems both before us and in the courts. At least part of the trouble seems to have arisen from competition to serve industrial customers in the Detroit area. As early as 1941 Panhandle attempted to render service to industrial customers wherever possible and tried to secure customers served by Michigan Consolidated.[3]

In proceedings before this Commission Panhandle has opposed applications by Michigan Wisconsin which would

[2] *Panhandle Eastern Pipe Line Co. v. FPC*, 236 F.2d. 289 (C.A.3), certiorari denied 335 U.S. 854.

[3] *Panhandle Eastern Pipe Line Co. v. P.S.C. of Indiana*, 332 U.S. 507, 509 (1947); *Panhandle Eastern Pipe Line Co. v. Michigan P.S.C.*, 341 U.S. 329, 333 (1951).

increase the capacity of the American Natural System. Panhandle sought to have set aside the original certificate of Michigan Wisconsin,[1] opposed Michigan Wisconsin's plans to expand its capacity to 75,000,000 Mcf per year[2] and intervened in opposition to Michigan Wisconsin's proposal to further expand its capacity to 110,595,000 Mcf.[3] When Am-La applied for authority to build its pipeline from Louisiana to Michigan with a capacity of approximately 300,000 Mcf, Panhandle again intervened alleging competition.[4]

In Docket No. G-1725 Panhandle applied for authorization under section 7(b) of the Act to reduce its deliveries at Detroit from 125,000 Mcf to 87,500 Mcf per day. The presiding examiner's decision (*Supra* Note 5) denying abandonment of service was adopted by us.[5] Panhandle brought review proceedings with respect to this order in the Third Circuit Court of Appeals, which vacated our order and remanded it for further consideration because of the Court's reversal of our orders in other proceedings relating to the delivery of gas by Panhandle.[6]

Pursuant to the order of the Court further hearings were held, another presiding examiner's opinion was issued

---

[1] *Michigan Wisconsin Pipe Line Co.*, 6 FPC 1, 32, No. G-669, affirmed *Panhandle Eastern Pipe Line Co. v. FPC* 169 F 2d 881, 884 (CADC) certiorari denied, 335 U.S. 854.

[2] *Michigan Wisconsin Pipe Line Co.* et al. 8 FPC 293, 294. At the oral argument Panhandle's counsel stated that the company was indifferent as to whether Michigan Wisconsin's applications were granted as long as there was no impairment of its rights in the Detroit and Ann Arbor markets.

[3] *Michigan Wisconsin Pipe Line Co.*, et al. 9 FPC 152, 154, No. G-1302; see Presiding examiner's decision in *Panhandle Eastern Pipe Line Co.* 11 FPC 575, 579, 580, No. G-1725.

[4] *American Louisiana Pipe Line Co., et al.* 13 FPC Opinion No. 276, docket No. G-2306 et al. October 1, 1954, p. 18.

[5] *Panhandle Eastern Pipe Line Co.* 11 FPC 597, No. G-1725.

[6] *Panhandle Eastern Pipe Line Co. v. FPC* 204 F 2d 925 (CA 3).

April 19, 1955 denying abandonment of service, and we issued an order on June 7, 1955 adopting the presiding examiner's decision.[10]

When Panhandle sought review of our order, it was affirmed by the Court of Appeals for the Third Circuit.[11] The Court disapproved Panhandle's contentions that it had been given permission by previous language of the Commission in Docket No. G-669[12] to abandon service to Michigan Consolidated, and also pointed out that Panhandle, relying on these contentions, had failed to prove that the public convenience and necessity supported its proposed partial abandonment.

In the present proceeding Panhandle has made a further attempt to abandon service, this time all of its service, to Michigan Consolidated. Unlike prior proceedings there is substantial evidence in the record tending to show that the public convenience and necessity would permit the abandonment. Under Section 7(b) of the Act there are two bases on which we may permit abandonment: (1) "that the available supply of natural gas is depleted" and (2) "that the present or future public convenience or necessity permit such abandonment". Panhandle's application in the present proceedings is on the basis of the second ground.

An appropriate standard is set forth in our Opinion No. 239, 11 F.P.C. 167, 170-171, denying partial abandonment where we said that Panhandle had "made no showing that

[10] *Panhandle Eastern Pipe Line Co., et al.*, 14 F.P.C. ..., No. G-1116, June 7, 1955.

[11] *Panhandle Eastern Pipe Line Co. v. F.P.C.*, 236 F. 2d 289 (C.A. 3), certiorari denied 335 U.S. 854.

[12] The Commission had provided in connection with granting the certificate to Michigan Wisconsin: "That upon the termination of its contracts, and upon mutually satisfactory terms, Panhandle is afforded reasonable opportunity to deliver and sell to Michigan Consolidated not less than the annual volumes of gas delivered and sold by it." *Michigan-Wisconsin Pipe Line Co.*, 6 F.P.C. 58, 91, No. G-669.

the needs of the consuming public served by these other customers for natural gas are greater than, or as great as, the needs of the consuming public in the areas served by Michigan Consolidated and Michigan Wisconsin in the event of the cutback at "Detroit" or no showing "of benefits to the consuming public along the Panhandle system . . . which would offset the injury and damage to the consuming public . . ." served by the other systems. The standard we employed in that opinion is in accord with that of the Court in *Colorado* v. *United States*, 271 U.S. 153, 168, where it was said with respect to abandonment of a railroad line authorized by the Interstate Commerce Commission that "The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected."

The factual situation in which Panhandle makes its present application for abandonment differs from that in the past. This is foreseen by the Court of Appeals for the Third Circuit, referring to American Louisiana's pipeline of 300,000 Mcf daily capacity, which at the time had been authorized but not built, and saying: (236 F.2d at p. 294):

> "If and when it actually comes into operation and Michigan Consolidated receives an allocation of its gas Panhandle will be free to renew its application for partial abandonment of its service to Detroit."

As recited in our order of October 10, 1958, the pipeline has been built and an allocation of gas has been made therefrom to Michigan Consolidated. This amounts to 146,000 Mcf per day on a permanent basis and 51,600 Mcf per day on temporary basis. (17 F.P.C. 657, 659).

There is sufficient gas available from the capacity of American Louisiana's pipeline that has not been permanently allocated in Docket No. G-2306, relating to the original construction of the line, and in Docket No. G-10396 to permit the abandonment without depriving Michigan Consolidated or the American Natural System of gas al

located to them other than on a temporary basis. In our opinion No. 291, 15 F.P.C. 23, 43, out of the 300,000 Mcf proposed capacity of Am-La's pipeline, we reserved 80,000 Mcf for future disposition for the purpose of serving new markets. This reserved capacity was reduced by later orders (See 17 F.P.C. 657, 659) to 59,855 Mcf, including the 51,600 temporarily allocated to Michigan Consolidated. In connection with the applications of the Midwestern Company to serve areas in the middle west including the Chicago area Michigan Wisconsin applied for a certificate to serve new areas in Wisconsin. In our opinion and order No. 316, issued October 31, 1958[13] we found that Michigan Wisconsin had not established the economic feasibility of its proposed service and denied the request for a certificate. The 59,885 Mcf of gas per day thus remains available for disposition.

While it has been argued that Michigan Wisconsin's proposed customers in Wisconsin have a "prior call" on the 59,885 Mcf of gas, as we stated in our *Midwestern* opinion, our setting aside the gas so as to make it possible to serve new markets does not mean that should demands on the part of existing markets become of greater importance in the public interest, the new markets must forever be protected because of the provisions of our opinion No. 291 and accompanying order. On the basis of the present record containing evidence of the compelling needs of present customers of Panhandle for gas, it is our opinion that the 59,885 Mcf should go to replace Panhandle's gas, as opposed to employing it in areas where no gas service exists, and costs will likely be high.

In the present proceeding the evidence showed that with the "step one" facilities installed, the designed capacity of Am-La's pipeline became 357,000 Mcf per day.[14] As

[13] *American Louisiana Pipe Line Co. et al.*, 20 F.P.C. Docket No. G-2306 *et al.*, October 31, 1958.

[14] This represents an increase of 35,700 Mcf over the actual capacity before the "step one" facilities are installed of 321,300 Mcf per day.

noted in our previous order the evidence further showed that the capability of Am-La's pipeline was substantially in excess of 357,000 Mcf per day. From Am-La's presentation it appeared that if the spare compressor units were operating, the daily delivery capacity of gas from the Louisiana fields would be 367,800 Mcf on the winter peak day with no receipts from Texas Gas Transmission Company. At least at times even larger amounts of gas would be available, for the contracts with the producers in the Louisiana fields provide that the buyer can take gas at a rate of 125 percent of the average daily quantities set forth in the contract.[5] On this basis, it was testified that 406,000 Mcf per day is available from the Louisiana fields for delivery to the pipeline, and after deducting compressor fuel and line losses at least 385,000 Mcf per day would be available for delivery to the pipeline's customers. Even at this rate Am-La's present reserves would have a life of 16 years at full deliverability plus 23 years at a reduced rate. While deliveries at a rate of 385,000 Mcf per day would be available on some days upon demand, it is doubtful whether under the terms of the producer contracts such a rate of delivery would be available on a daily basis through the year or even for a significant part of the year.

Under its contract with Texas Gas Am-La is entitled to receive at Slaughters, Kentucky, 18,615,000 Mcf per year at 14.73 psia or an average of 51,000 Mcf per day. However,

[5] One West Little Chenier Field Contract (Ex. 5) provides with respect to quality:

> 1. Seller agrees to sell and deliver to Buyer and Buyer agrees to purchase and take from Seller hereunder, or pay seller for an average daily quantity of gas attributable to Seller's interest in the West Little Chenier Field equal to one million cubic feet for each eight (8) billion cubic feet of reserves. ***
>
> 2. Buyer agrees that its take of gas hereunder during any one day shall never be less than seventy five (75) percent nor more than one hundred twenty five (125) percent of the average daily quantity set forth in section 1 above.

as the presiding examiner points out, this gas is not available during the high demand months of December, January and February, so that it cannot be counted on to meet peak day requirements. Am La includes this gas in its average figure of 357,000 Mcf per day referred to above. Since it is available only part of the year, it is obvious that all of Am-La's gas must come from Louisiana during the remainder of the year including the high demand months. In fact, the record shows that if 370,000 Mcf per day is received by the pipeline in Louisiana, the 357,000 Mcf can be delivered to customers without receipts of gas from Texas Gas. Therefore, the gas from Texas Gas can be considered here as additional on an annual basis although not available on peak days.

While not immediately available for the purposes of this order we should note that we have recently authorized the expansion of the capacity of Michigan Wisconsin's facilities by 40,000 Mcf per day.[8] The allocation of such gas is now before a presiding examiner. More recently in the same docket Michigan Wisconsin requested amendment of its certificate to increase the proposed 40,000 Mcf per day expansion to 80,000 Mcf per day, but the allocation of this additional 40,000 Mcf is the subject of a separate proceeding in docket No. G-16998.

Again, while not immediately available, it would be possible for Am-La to install at modest cost its "step two" facilities for which it made application in Docket No. G-10396 upon acquiring additional supplies of gas. The "step two" facilities would consist of a new 8,000 horsepower and a new 10,000 horsepower compressor station and would increase Am-La's daily delivery capacity by an additional 40,000 Mcf.

As to unallocated gas available to Michigan Consolidated, we can conclude that on a firm basis there is 59,885 Mcf

[8] Presiding Examiner's decision, *Michigan Wisconsin Pipe Line Co., et al.*, 19 F.P.C. ____, docket No. G-13246, *et al.*, issued June 1, 1958, adopted by us 19 F.P.C. ____, June 20, 1958.

from the original 300,000 Mcf capacity which has not been disposed of in Docket No. G-2306, plus 57,000 Mcf available as a result of Docket No. G-10396, or 110,885 Mcf per day altogether. This will be available to replace the 127,000 Mcf per day of Panhandle gas.[17] The difference of 19,115 Mcf per day can be made up by Am La's increase of its output up to 367,800 Mcf per day by using all compressors, and to 385,000 Mcf or more by increasing its demand on the suppliers in Louisiana.

On an annual basis there is sufficient gas available to replace the Panhandle gas, amounting to 46,355,000 Mcf per year. The 57,000 Mcf available in Docket No. G-10396 amounts to 20,805,000 Mcf per year, while the 110,885 Mcf available in Docket No. G-2306 amounts to 21,858,025 Mcf per year, or a total of 42,663,025 Mcf. In addition there is 18,615,000 Mcf available from Texas Gas each year.

The annual requirements of the American Natural System amount to 262,278,160 Mcf, as found by the presiding examiner, without exception by Am La. This figure may be compared with our previous findings in this docket as to the requirements of the system. In our Opinion 291, as modified by subsequent orders, we found that the total requirements of the system for the year 1958 were only 244,700,548 Mcf.[18] In fact, in our opinion and order we provided that Michigan Wisconsin should impose provisions in its tariff limiting the number of space heating customers to those to be connected as of January 1, 1958, and limited Michigan Wisconsin's future obligation to deliver gas to Michigan Consolidated. (15 F.P.C. at p. 47)

[17] Am La's gas is presently delivered with a higher Btu content than the Panhandle gas, so that the staff contended that the amount of 127,000 Mcf should be adjusted to reflect this difference. However, Am La's suppliers have the contractual right to reduce the Btu content of the gas, so as to eliminate the need for the adjustment.

[18] *American Louisiana Pipe Line Co.*, 15 F.P.C. 23, 41 (1956); 15 F.P.C. 857, 17 F.P.C. 300, 17 F.P.C. 557.

Available to meet the American Natural System's requirements is gas transported by Michigan Wisconsin pipeline with a designed capacity of 110,595,000 Mcf, a capacity which clearly can be and has been exceeded.[19] As stated by Am La in its exceptions, Michigan Wisconsin actually transported 111,236,925 Mcf in 1955 and 111,675,197 Mcf in 1956. These amounts exclude for the purposes of the abandonment question a non recurring net drawdown of storage in 1955 and a purchase from Natural Gas Pipeline Company in 1956. To the 1956 amount of 111,675,197 Mcf we add Am La's figure of 130,305,000 Mcf for gas available from its pipeline (365 x 357,000 Mcf) and the 18,615,000 Mcf available annually from Texas Gas to make a total of 260,595,197 Mcf. This is close enough to the requirements figure of 262,278,160 so that the difference can be made up by the means described on pages 5 to 6, *supra*.

Our conclusion that the American Natural System has presently an adequate supply of gas is confirmed by the fact that Michigan Wisconsin filed an application on September 5, 1958 in Docket No. G-16197 seeking a certificate of public convenience and necessity to initiate a short term, winter sale of natural gas to Natural Gas Pipeline Company of America in an aggregate amount not to exceed 6,300,000 Mcf. By letter dated November 3, 1958, we granted temporary authorization to make this sale. A similar application was made and authorization granted in 1957 in Docket No. G-13354.

Thus we conclude that there is sufficient unallocated gas and other gas available to replace the gas received from Panhandle. We are aware of course, that the record contains extensive testimony on the needs of the American Natural System, but the record likewise contains extensive testimony on the needs of customers of Panhandle for ad-

[19] See our order *Michigan Wisconsin Pipe Line Co.*, 18 F P C 407, 409.

itional supplies of gas. [illegible] to approach this problem is to compare the heating saturation of Panhandle's customer, Michigan Consolidated, which would be deprived of Panhandle's service, with the heating saturations of other customers of Panhandle, more particularly those which are wholly dependent on Panhandle for gas service.

In the present proceeding the total number of residential and commercial customers and the total number of heating customers purchasing gas sold by American Louisiana and Michigan Wisconsin has been shown as of the end of 1956. By dividing the number of heating customers by the total number of residential and commercial customers a percentage figure is obtained which represents heating saturation. A similar computation has been made with respect to the customers served through the Panhandle system. On the basis of the evidence in the record, as of the end of 1956, the space heating saturation on the system of Panhandle's customer Michigan Consolidated is 54.67 percent while the space heating saturation on the systems of other utility customers of Panhandle which are wholly dependent on Panhandle for gas is only 50.4 percent. The Consolidated System and Ohio Fuel Gas Company have a higher saturation on their systems than the 50.4 percent above, but they have other sources of gas.

Michigan Consolidated has argued that loss of the 127,080 Mcf of gas per day from Panhandle would cost its consumers $5,400,000 per year. We agree with the presiding examiner that this figure should be reduced because of the higher Btu content of substitute gas received from Am-La. It also should be reduced because Michigan Consolidated and the presiding examiner have used a proposed rate for Am-La that is not currently effective. The increased cost to Michigan Consolidated would actually be $4,239,115 per year. This amount would not result in substantial rate increases even if passed on to consumers on the system of Michigan Consolidated. Conversely, con

customers who will be entitled to Panhandle's gas will receive a commensurate benefit. As opposed to any slight increase on the Michigan Consolidated system, we may note that some of the customers of Panhandle have had to manufacture gas at a cost of $1.50 per Mcf in order to overcome serious shortages on their systems. Michigan Consolidated does not have a vested right to the lower priced Panhandle gas. Customers of Panhandle who have the natural advantage of being closer to Panhandle's source of supply have at least as good claim to the gas, even if the needs of Panhandle's customers were no greater than those of Michigan Consolidated.

We are of the opinion that under the circumstances and for the reasons set forth above that abandonment of service by Panhandle to Michigan Consolidated should be authorized and "that the present or future public convenience or necessity permit such abandonment." The availability of gas to the American Natural System and Michigan Consolidated permit the abandonment without undue sacrifice to the consumers served by that System. The lesser saturation on the systems of the customers dependent entirely on Panhandle service shows that Panhandle's gas can be used to greater advantage on the systems of these customers than by Michigan Consolidated. Moreover, with the separation for which we are providing both Panhandle and Michigan Consolidated should be in a stronger and in an independent position.

With respect to the disposition of the 127,000 Mcf of gas that will be available to the Panhandle System we shall ask that Panhandle submit a plan for its proper allocation. During the course of the hearing Panhandle did submit such a plan but this plan would have apparently resulted in some of the gas going to industrial customers. A new plan should provide that the gas should be sold for resale primarily to domestic and commercial consumers.

As noted above Michigan Consolidated can be supplied by the 59,885 Mcf per day reserved and temporarily allo-

rated in Docket No. G-2496 and by means of the capacity of Am-La's pipeline above the original 300,000 Mcf per day temporarily allocated in Docket No. G-10296. We will therefore order that Am-La deliver 127,000 Mcf of gas per day to Michigan Consolidated in lieu of the temporary allocations made in such dockets, adjusted for any difference in Btu content.

The Commission further *finds*:

(1) Panhandle, a Delaware corporation with its principal place of business in Kansas City, Missouri, is a "natural gas company" within the meaning of the Natural Gas Act, as heretofore found by the Commission in its order of June 30, 1956, *In the Matter of Panhandle Eastern Pipe Line Company*, Docket No. G-4705, 15 F.P.C. 46, 71.

(2) The sale of natural gas by Panhandle to Michigan Consolidated is a sale in interstate commerce for resale, subject to the jurisdiction of the Commission, and the proposed abandonment of all or any part of the facilities used in making the sale and any service rendered by such facilities are subject to the requirements of subsection (b) of Section 7 of the Natural Gas Act.

(3) The present and future public convenience and necessity permit the abandonment of natural gas service by Panhandle to Michigan Consolidated.

(4) It is necessary and appropriate in the administration of the Natural Gas Act that Panhandle should file a plan for the allocation of the gas now sold to Michigan Consolidated.

(5) It is necessary and appropriate in the administration of the Natural Gas Act that Am-La alter its allocation of gas to Michigan Wisconsin and Michigan Consolidated in accordance with (C) below.

The Commission *Orders*

(A) Panhandle is hereby permitted to abandon service to Michigan Consolidated and any facilities used to effect such service on March 15, 1959.

(B) Within 30 days of the issuance of this order Panhandle shall submit for the approval of this Commission a plan of allocating the gas presently being delivered to Michigan Consolidated so that such gas will be available for sale for resale primarily to domestic and commercial consumers.

(C) Am-La from the present capacity of its pipeline shall deliver to Michigan Consolidated 127,000 Mcf of gas per day at 981.1 Btu or the equivalent quantity with a different Btu content, utilizing the 59,885 Mcf of gas reserved in Docket No. G-2306 and the additional capacity made available in Docket No. G-10296 until further order of the Commission.

(D) Exceptions filed to the presiding examiner's decision to the extent not granted by this order are hereby denied.

By the Commission. Commissioner Kline would authorize a partial abandonment only.

JOSEPH H. GUTRIDE,
Secretary.

APPENDIX IV

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole and Arthur Kline.

Docket Nos. G-10296, G-10400, G-11001

In the Matters of

AMERICAN LOUISIANA PIPE LINE COMPANY, GULF OIL CORPORATION, PANHANDLE EASTERN PIPE LINE COMPANY

ORDER DENYING APPLICATIONS FOR REHEARING, GRANTING STAY AND FIXING HEARING ON ALLOCATION OF GAS

(Issued February 13, 1959)

These matters come before us again on numerous applications for rehearing[1] filed with respect to our order issued December 19, 1958, permitting abandonment of service by Panhandle Eastern Pipe Line Company to Michigan Consolidated Gas Company in the amount of 127,000 Mcf of gas per day or 46,355,000 Mcf per year. As discussed below, the considerations set forth in the applications for rehearing do not cause us to change the result at which we have arrived. However, we will grant a stay of our order pending our determination of the proper

[1] Filed by American Louisiana Pipe Line Company; Michigan Wisconsin Pipe Line Company; Michigan Consolidated Gas Company, Iowa Southern Utilities Company; County of Wayne, Michigan; State of Wisconsin and Public Service Commission of Wisconsin, jointly; Wisconsin Fuel and Light Company, Merrill Gas Company, City Gas Company, People's Gas Company, and Wisconsin Rapids Gas and Electric Company, jointly; Michigan Public Service Commission; City of Detroit, City of Milwaukee; Iowa Electric Light and Power Company, Madison Gas and Electric Company; Natural Gas Distributors, Inc., Keokuk Gas Service Company; North Central Public Service Co.; Wisconsin Natural Gas Co. and Wisconsin Michigan Power Company, jointly; Wisconsin Power and Light Company; St. Joseph Light and Power Company, Milwaukee Gas Light Company.

allocation of the gas Panhandle is now delivering to Michigan Consolidated after a hearing for which we made provision in this order. We may now turn to the objections made to our order.

Adequacy of Gas Supply to the American Natural System Without the Panhandle Gas

American Louisiana Pipe Line Company (Am-La) contends that it does not have sufficient capacity to deliver 127,000 Mcf per day to Michigan Consolidated as ordered by the Commission. The basis of this argument is that the designed capacity of Am-La's pipeline in the amount of 357,000 Mcf per day is not sufficient to meet permanent allocations from Am-La's capacity in the amount of 244,288 Mcf per day in addition to the 127,000 Mcf per day of capacity withdrawn by Panhandle. As indicated in our prior order the record shows that on a daily basis Am-La's pipeline can deliver well in excess of the 357,000 Mcf per day designed capacity.

A witness for Panhandle introduced a well considered study showing a possible operation of Am-La's pipeline at different seasons of the year. During the midwinter months of December, January and February he showed that the pipeline was able to receive 398,000 Mcf per day in the Louisiana fields and deliver up to 385,000 Mcf per day without receiving any gas under its contract with Texas Gas Transmission Corporation. In contrast, he that the pipeline was able to receive 398,000 Mcf per day showed that during the summer months of June, July and August when Am-La would receive 102,000 Mcf per day available from Texas Gas, it could deliver up to 461,000 Mcf per day after cutting back its purchases in the Louisiana fields to 347,000 Mcf per day. Furthermore, it may be

[4] Michigan Consolidated 146,000 Mcf per day; Michigan Wisconsin 90,515 Mcf per day; Paris-Henry County 3,945 Mcf per day; Lincoln Natural Gas Co. 1,328 Mcf per day; Ohio Valley Gas Corp. 2,500 Mcf per day (17 F.P.C. 659; 16 F.P.C. 908-909).

noted that the maximum daily contract quantity available from the Louisiana fields is 461,000 Mcf per day which would permit a delivery, after deduction of fuel and line losses, of 387,000 Mcf on days when no gas is available from Texas Gas. As we indicated in our prior order, it is doubtful whether under the producer contracts as they now read that such deliveries are available on a continuous basis, but they are available to meet peak day requirements on the American Natural System. Thus as we indicated in our prior order even though there were an annual deficiency, this could be overcome by the flexibility inherent in Am La's pipeline and producer contracts enabling it to meet peak demands substantially in excess of its designed capacity of 357,000 Mcf per day. The storage fields of Michigan Wisconsin and Michigan Consolidated, of course, also provide flexibility and increase the system's ability to meet peak demands.

Turning to the matter of annual deliveries we find that Am La contends that we have overestimated the ability of its pipeline in the amount of 20,298,000 Mcf per year. It says that this alleged error results principally from including the 18,615,000 Mcf per year available from Texas Gas in addition to the designed annual sales capacity of 357,000 Mcf per day or 130,305,000 Mcf per year. There is little doubt in the record that the pipeline is capable of delivering the designed quantities in addition to the gas from Texas Gas. In accordance with the plan of operation contemplated by Am La, during the winter months the pipeline would receive 370,000 Mcf per day in the Louisiana fields in order to deliver the 357,000 Mcf per day referred to above without any receipts from Texas Gas. During the other parts of the year there is no physical reason why these receipts from the Louisiana fields could not be continued while receiving the gas available from Texas Gas. Panhandle's evidence, referred to above, shows that even larger receipts could be obtained from the Louisiana fields while receiving varying amounts of gas from Texas Gas.

The only possible limitation on Am-La being able to deliver the 130,000,000 Mcf per year in addition to the gas from Texas-Gas is contained in the contracts with the producers in the Louisiana fields. These contracts provide for sale and delivery of an average daily quantity of gas depending upon the size of the seller's reserves with various provisions for adjusting this quantity in case the estimate of the reserves is increased or decreased. As we have noted in our prior order the take of gas during any one day shall never be less than 75% nor more than 125% of the average daily quantity. It may be that the contracts, properly interpreted, mean that the average daily quantity may not be exceeded on an annual basis, but we do not believe that this is a practical limitation on Am-La. This is indicated by the contracts themselves. As the contracts are drafted there are many provisions inserted for the protection of the seller in case the buyer should take less than the average daily quantity, but no provision as to the consequences if the buyer should take more than the contract quantity. Furthermore, we note that Am-La's vice president as a witness stated that it could take 125% of the contract quantities until the wells ran dry. Taking the gas at the present contract rates the reserves would last twenty years, while if the gas were taken at the 125% rate the reserves would last as long as 16 years. In view of the present reserves with their long life index we are of the opinion that the possible limitation in the contract terms does not require us to deny Panhandle's application. We are convinced that the result is a reasonable pragmatic adjustment in view of the strong public interest in permitting Panhandle to make use of its own gas.

On this basis we are not presently relying on increased gas supplies from the Laverne field or the installation of the "Step 2" facilities as contended by some of the parties. We mentioned these factors only to suggest that as Am-La's requirements increase, as they undoubtedly

well there is also a vista of increased gas supplies and expansion of pipeline capacity. As Ani La states in its brief, the ultimate design of the pipeline will involve the addition of a number of compressor stations and a sales capacity of 550,000 Mcf per day.

We are not forcing Ani La or Michigan Wisconsin to install additional transportation facilities or to operate beyond their capacities. As Ani La points out we do not have power to do that; we leave these matters to the discretion of management. We are merely determining whether it is necessary in the public interest to require Panhandle to continue a service or whether the American Natural System can render reasonable service itself with out this additional gas.

There is a further consideration showing that the American Natural System cannot make just complaint that it is required to meet its own needs. As our order of December 19, 1958 noted, our Opinion No. 291 limited the various parties dependent upon Michigan Wisconsin and American Louisiana to expected firm loads as of January 1, 1958, for which gas was then made available. The December 9, 1958, order showed that this 1958 requirement for which gas had been provided was 240,700,548 Mcf. The record shows that the increased requirements set forth therein can be met by the American Natural System and that *a fortiori* it can meet the lesser requirements as limited by Opinion No. 291.

Standards for Abandonment and their Application

Some of the applicants for rehearing state that we have used a narrow and incorrect standard in permitting abandonment and then have misapplied it in the present proceedings. In our prior order we referred to a standard of comparative needs as between the consuming public served by Panhandle's utility customers and the needs of the consuming public served by Michigan Consolidated

and Michigan Wisconsin; we compared the space heating saturation on the system of Michigan Consolidated with that on the systems of those customers of Panhandle whose only source of gas is Panhandle, and we found that Michigan Consolidated's space heating saturation was greater than that on the systems of those customers of Panhandle. Michigan Consolidated believes that such an approach would lead to a multitude of abandonment proceedings, whose outcome would be dependent on variations in space heating saturations. Of course, we did not approach the problem so narrowly. We were concerned and are concerned whether "the present or future public convenience and necessity *permit* such abandonment", the standard of Section 7(b) of the Gas Act. The standards mentioned here and in our previous order were but partial criteria used in reaching a result within the language of the statute. The statute, it may be observed, because of its permissive language implies that while a given service might be in accordance with the public convenience and necessity, abandonment might also be permitted by the public convenience and necessity; in other words, abandonment will be permitted unless inconsistent with the public convenience and necessity.

Following the statute it would appear that the economic effect of the abandonment on the Detroit area would be relevant as argued by Michigan Consolidated, Wayne County and other applicants for rehearing, and we have taken this into consideration as opposed to the undoubted need of Panhandle's own customers for gas. We do not believe, however, as argued by Wayne County and the City of Detroit that Panhandle's service to Michigan Consolidated and the Detroit area gives the consumers in that area any priority in the Panhandle gas, merely because their patronage has contributed to the development of Panhandle's system. Presumably they paid no more than a reasonable rate so that they have no more right

to the gas than does any other utility customer to continued service.

Also relevant, but not controlling, is the need for additional gas on the systems of Michigan Wisconsin's distributors, some of whom have comparatively low space heating saturations. While we have carefully considered the problems of these companies, the space heating saturation of Michigan Consolidated, which is being directly deprived of the Panhandle gas and the advantages of separating the two systems have greater weight. It follows also that our order properly provides that deliveries be made to Michigan Consolidated to make up for the loss of the Panhandle gas. Our order leaves largely unimpaired the present firm gas supplies to Michigan Wisconsin's distributors although they will obtain no additional firm gas supplies for expansion from the reserved gas or that made available in this Docket No. G-10296.

As against whatever detriments there may to Michigan Consolidated and its customers and to Michigan Wisconsin and its customers and their consumers, the record shows great demands for service on Panhandle's system. As Panhandle points out in its brief the peak day requirements for the 1957 heating season were more than 497,000 Mcf in excess of the amount of gas its utility customers could demand under their contracts. Similarly, this deficiency would increase to more than 639,000 Mcf in 1958 and more than 733,000 Mcf in 1959.

A comparison can be made as follows: The capacity of Panhandle's system, including its affiliate, Trunkline Gas Company, is approximately 1,269,148 Mcf per day. The record in the present proceeding shows that Panhandle's utility customers, other than Michigan Consolidated, could have used 1,519,139 Mcf per day on peak days in the year

See our order *Town Gas Company of Illinois*, 19 FPC 143, 144.

1957. Thus divisting, we find that Panhandle can meet the demands of its customers to the extent of only 83.8 percent.

On the other hand the peak day supply to the American Natural System in the 1956-1957 season including the 59,885 Mcf of gas reserved in Docket No. G-2306, but not including the Panhandle Gas was 1,584,000 Mcf on the basis of the record. Similarly the peak day requirements as found by the presiding examiner were 1,855,459, so that these requirements could be met to the extent of 96 percent.

In applying the standard of the Act all of the considerations referred to in this order and in our prior order were weighed. Certainly the needs of Panhandle's customers for the gas coupled with the general considerations expressed in our previous order and again referred to below with respect to the relations between the two systems and their place in the natural gas industry show that the public convenience and necessity "permit" such abandonment.

---

[4] Exhibit 108 shows the firm gas requirements of Panhandle's customers purchasing gas for resale to be 1,614,139 Mcf per day. This includes 285,000 Mcf for East Ohio Gas Company and Ohio Fuel Gas Company. Since the space heating saturations of these companies are high, it may be presumed for the sake of the present computation that they will not be allocated any of the gas now being delivered to Michigan Consolidated. Therefore their requirements will be reduced by 95,000 Mcf to 190,000 Mcf, actual for the year 1956. The total requirements are reduced by the same 95,000 Mcf to 1,519,139 Mcf.

[5] This figure is composed of 324,000 Mcf from Michigan Wisconsin field, 598,000 Mcf from Michigan Wisconsin storage, 477,000 Mcf from Michigan Consolidated storage and 385,000 Mcf from Am-La. There does not appear to be a dispute about the first two figures. The 477,000 Mcf, which is lower than higher amounts claimed by Panhandle was not excepted to by Am-La. The 385,000 Mcf has been referred to in this present order.

[6] This amount was not excepted to by Am-La, although Panhandle would use a slightly smaller amount.

Disposition of the Reserved Gas

In our prior order we directed that Ani-La deliver 127,000 Mcf per day of gas to Michigan Consolidated, authorizing the 59,855 Mcf of gas reserved in Docket No. G-2306 for new markets and the additional capacity made available in the present docket; until our further order. We thus sought to insure that the gas provided by Panhandle would be replaced by supplies undoubtedly available on the system of American Natural. The Wisconsin Commission and other applicants for rehearing, particularly distributing companies in Wisconsin, contend, however, that the Commission's action deprives them without a hearing of their alleged rights in the reserved gas and thus deprives them of their property without due process of law.

Before considering the rights of the various claimants for such gas, we should note that, contrary to contentions, the reserved gas is involved in these proceedings. Here we are concerned as to whether the American Natural System will have sufficient gas supplies without Panhandle's gas. All of the American Natural System's gas supplies are thus relevant facts in arriving at a determination on Panhandle's application, and we may take notice of our own orders in other docket numbers when considering the reserved gas as available for permanent allocation. *U.S. v. Pierce Auto Lines*, 327 U.S. 515, 592.

With respect to distributing companies in Wisconsin or elsewhere that were parties to Docket No. G-2306, but not to the present proceeding in Docket No. G-10396, we cannot be directly concerned in this proceeding except insofar as their interests are represented by the Wisconsin Commission, but, in any case, the course of the former proceeding leaves it clear that the reserved gas was open to appropriate allocation by the Commission. In its Opinion No. 291, issued May 7, 1956 (15 FPC 231 as amended by subsequent orders (16 FPC 897; 17 FPC

300,657[1] the Commission made a permanent allocation of a portion of the capacity, totalling 300,000 Mcf per day, of Am.La's new pipeline but reserved for allocation to new markets 59,885 Mcf per day. In order to make use of this reserved gas Michigan Wisconsin filed an application in Docket No. G-9850 on January 6, 1956, amended April 15, 1957, to build a lateral line extending Westward in Wisconsin from a point on its north-south line near Lake Winnebago. By means of this lateral it proposed to sell natural gas to ten distribution companies furnishing new gas service to twenty nine communities in Wisconsin and one in Michigan. This application was the subject of extensive hearings in the Consolidated *Midwestern* omnibus proceeding. At these hearings distributing companies in Wisconsin and elsewhere had opportunity, of course, to intervene and present their cases in favor of Michigan Wisconsin's project or other allocation of gas service that would benefit them and the consumers served by them. Of the ten distributing companies which Michigan Wisconsin planned to serve, all were interveners in the consolidated proceeding. On October 31, 1958, we issued our Opinion No. 316 and Order relating to the proposals of Midwestern and Michigan Wisconsin among others.[2]

In that opinion we determined that Michigan Wisconsin had not proved the economic feasibility of its project and postponed for later decision the disposition of the 59,885 Mcf of reserved gas. Michigan Wisconsin, along with Midwestern and the other applicants, was made subject to a provision which required that it notify the Commission of its intention to reapply within ten days. Michigan Wis-

---

[1] City Gas Company; Merrill Gas Company; Peoples Gas Company; Northern States Power Co.; Wisconsin Hydro Electric Co.; Central Wisconsin Gas Co.; Wisconsin Fuel and Light Co.; Wisconsin Public Service Corporation; Natural Gas Distributors, Inc. and Wisconsin Rapids Gas and Electric Company.

[2] *American Louisiana Pipe Line Co.*, 20 F.P.C. , Docket No. G-2306, *et al.* October 31, 1958.

consin did file such a notice and did reapply (in Docket No. G-17180) to serve certain communities in Wisconsin utilizing the reserved gas.

Thus in Docket No. G-2306 we had held a hearing on a proposal for one possible disposition of the reserved gas with all interested parties given a chance to participate. Since nothing feasible resulted which would dispose of the reserved gas, there was no obligation to enter into further hearings when it later turned out that Michigan Consolidated could make appropriate use of the reserved gas upon cessation of Panhandle's deliveries. In our Opinion No. 316 we indicated that the reserved gas was subject to disposition other than to new markets. While the presiding examiner in that proceeding stated that the parties proposing to serve the new markets would have a "prior call" on the reserved capacity, we said that our reservation did not mean, "should demands on the part of the existing markets become of greater importance in the public interest the new markets proposed herein must forever be favored because of the provisions of our Opinion No. 291 and accompanying order." The reservation had been made in May of 1956; by October of 1958 another disposition of the gas had become appropriate. There can be no priority in the reserved gas. "Only Congress could confer such a priority". *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145.

The applicants for rehearing herein who claim rights in the reserved gas are, of course, subject to the effect of the proceedings in Docket No. G-2306,[2] but further than this, they have had the opportunity of participating in the hearings in the present docket. While the issue may not have been specifically framed as to the reserved gas versus the Panhandle Gas, it seems obvious that all parties seek

[2] All of the applicants for rehearing in Docket No. G-10296, which are listed in footnote 1 above, are parties to Docket No. G-2306, *et al.*

ing additional gas supplies from the American Natural System realized that the cessation of the Panhandle deliveries would mean that much less gas available to the American Natural System. Therefore it was the object of the companies in the American Natural System and their distributors to resist the Panhandle abandonment. Extensive evidence was accordingly presented as to the gas available on the American Natural System and the needs of the distributing companies, including their space heating saturations. We thus can see no need for further hearing on the question whether the reserved gas should be delivered to Michigan Consolidated to replace the gas withdrawn by Panhandle. "[D]ue process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of the parties." *Market Street R. Co. v. Comm'n.*, 324 U.S. 548, 562.

Two of the applicants for rehearing, Iowa Southern Utilities Company and Iowa Electric Light and Power Company, intervenors in the present docket, were also intervenors in Docket Nos. G-2306 and G-2327. In the latter dockets Iowa Southern was seeking an allocation of gas to serve the communities of Leon and Corydon, Iowa, while Iowa Electric proposed to serve Chariton, Iowa. A hearing was held in those dockets with respect to these projects, among others, and we considered them in our order issued September 4, 1956, (16 F.P.C. 807). There we determined that the costs of bringing gas to these towns by lateral lines constructed from Michigan Wisconsin pipeline were "such as to render the projects economically infeasible from the standpoint of these applicants" (16 F.P.C. at p. 902), and we deferred final decision. Both companies now complain that in our order of August 29, 1957, (18 F.P.C. 198) we had stated that their rights would be protected as their requests for service from Michigan Wisconsin would be considered in relation to the final decision of the issues presented in the two dockets, but that in

our order of December 19, 1968, they were deprived of their rights in the reserved gas.

In our opinion these companies and their customers have not been deprived of substantial rights. Their projects have been considered once and found wanting. Like other intervenors in Docket No. G-10296 both companies were given opportunity to resist the abandonment proposal. They have shown in no way that it would have made any difference in the presentation of evidence if they had known that as a result of abandonment, the reserved gas would be allocated to Michigan Consolidated. We do not see that these two Iowa Utilities stand in any different position than other intervenors in the present docket deprived of the use of the reserved gas.

Other Procedural Matters

A number of the applicants for rehearing contend that our order of December 19, 1968, is defective on various procedural grounds. They contend that we ignored the decision of the presiding examiner. We did not overlook the decision of the presiding examiner in reaching our conclusions on this matter, but we did not refer to it in the course of our order because not only our conclusions but our reasoning differed from his. In our final ordering clause (D) we took specific cognizance of his decision in denying exceptions not specifically granted.

They contend that we adopted several theories which were never advanced by Panhandle, the moving party as to which they had no notice or opportunity to be heard. We are clearly not required to act only on theories advanced by the parties before us; in fact regulation in the public interest would clearly dictate otherwise. In any case there has been no showing that the evidence presented would be any different based on the precise reasoning of our order.

Some of the applicants for rehearing contend that the Commission erred in providing for the submission of a revised plan of redistribution of Panhandle's gas because they are thus not given an opportunity to attack any redistribution plan. We see no validity in this objection. In our December 19, 1958, order we provided that the plan should allocate the gas so that it would be available for sale for resale primarily to domestic and commercial consumers. We thereby indicated that if the plan met this criterion among others, it would be in the public interest. The American Natural Companies and their distributors have no proper further interest in the gas. Compare our opinion in *Houston Texas Gas and Oil Corp.*, 16 F.P.C. 118, 17 F.P.C. 303, 542 affirmed 251 F. 2d 843, 648-649 (CADC), *certiorari* denied 356 U.S. 959, where it was held that there need not be further hearings as to whether the pipeline had complied with the rather elaborate conditions we had inserted in our order granting certificates of public convenience and necessity. Otherwise there would be no end to proceedings in these matters. It is solely with respect to the abandonment of service with which Michigan Consolidated and other parties are primarily concerned and not the ultimate disposition of the natural gas by Panhandle which is subject to our future approval. All parties were fully heard on the abandonment issue, and we are of the opinion that the present and future public convenience and necessity as shown by the record clearly indicates that our permission and approval to abandon was fully warranted.

Michigan Consolidated contends that the proceedings should be reopened (1) to receive evidence which was excluded from the record, (2) to receive evidence of significant developments which have occurred since the record was closed, and (3) to afford a hearing as to the facilities Panhandle is being authorized to abandon. The evidence in question was excluded by the presiding examiner and on October 3, 1957, Michigan Consolidated filed an appeal

with the Commission which was denied by our order issued October 31, 1957, 18 F.P.C. 571. Michigan Consolidated's application for rehearing was rejected on the ground that the order was not final." Upon reconsideration of the evidence we see no reason to change the conclusions expressed in our order issued October 31, 1957.

The evidence in question falls into several categories. One category relates to a possible development of the Howell Field in Michigan as an alternative to the abandonment. However, the proffered evidence indicates that development of the Howell Field would require the expenditure of between $14,000,000 and $20,000,000 and would make available but a fraction of the amount of gas available from the Panhandle abandonment, so that it does not appear to be a feasible alternative. We are also doubtful as to whether such evidence could in any case be relevant in view of our lack of power to require a natural gas company to enlarge its transportation facilities. *Michigan Consolidated Gas Company* v. *F.P.C.*, 246 F. 2d 904, 909-910 (C.A. 3) *certiorari* denied 355 U.S. 894.

Evidence relating to Panhandle's reserves is not relevant because the amount of gas available to the Panhandle System is limited by the capacity of Panhandle's pipeline, not by its reserves.

With respect to the proffered evidence relating to the controversy between the American Natural System and the Panhandle System we have already noted in our order of October 31, 1957, that mere controversy is not a basis for abandonment. However, the existence of the controversy and its general nature, as referred to in our order of December 19, 1958, is already sufficiently detailed in the record or in past proceedings. Evidence of Panhandle's desire, if any, to serve industrial customers is not relevant because under the terms of our order the 127,000 Mcf per day of gas must be sold for resale primarily to domestic and commercial consumers.

Evidence relating to the financial benefits that Panhandle gained in the past by serving Michigan Consolidated has no relevance, for the buyer gains no priority because of the benefits his patronage confers upon the utility seller.

In our October 31, 1957, order and in this order we have already indicated that the details of Panhandle's disposition of its gas are not relevant to a determination of the abandonment question. Whether or not Panhandle has adequate lateral capacity can be considered, if necessary, in connection with a plan of distribution of gas.

Evidence with respect to Michigan Consolidated's cost of manufactured gas is irrelevant, as the delivery of Panhandle's gas is being fully replaced under the terms of our December 19, 1958, order and because we are of the opinion that the American Natural Gas System has available natural gas to take care of the requirements of the affiliates comprising the system.

Turning to the significant developments that Michigan Consolidated says also require reopening the record, we find that they consist of (1) the application by Trunkline, Panhandle's subsidiary, in Docket No. G-15394 to expand and sell gas to Consumers Power Company; (2) the application by Midwestern Gas Transmission Company in Docket No. G-16841 to build a new pipeline to the Chicago area; and (3) completion of the pipeline of Trans Canada Pipe Lines, Ltd. allegedly releasing 15,500,000 Mcf of gas per year that Panhandle is now exporting to Union Gas Company. Apart from the fact that any request to reopen the record to adduce additional evidence is not timely under Section 1.33 of our Rules, we have been fully aware of the nature of the above developments. The Trunkline application is not yet before us; the hearing on the Midwestern application has not yet been completed and Midwestern does not propose service to Panhandle or to any customer of Panhandle for use in an area now served with gas purchased from Panhandle; whether Panhandle

should cease selling gas to Union Gas Company still remains to be seen in spite of the completion of the Trans-Canada pipeline and irrespective of the terms of its contract with Union. There is thus nothing to be added by reopening for evidence on these matters.

Lastly Michigan Consolidated contends that the record should be reopened to afford a hearing of the facilities Panhandle will abandon. The record indicates that the facilities involved will probably include little more than a metering station and their removal will have no appreciable financial effect upon Panhandle. Further Michigan Consolidated will not be affected by the gas abandoned.

We shall therefore deny Michigan Consolidated's request for reopening the record. We shall also deny Panhandle's request for leave to file an answer to the application to reopen, for the application to reopen is indistinguishable procedurally from and a part of the application for rehearing, and neither our Rules nor the Natural Gas Act provide for an answer to an application for rehearing.

Many of the applicants for rehearing request a stay of our order until the rights of the parties have been finally determined upon judicial review. We will defer setting an effective date for the abandonment until the issuance of our order determining the appropriate allocation of Panhandle's gas.

Conclusion on Rehearing

We conclude that the applicants for rehearing have presented no considerations which alter our conclusion that the public interest not only "permits," within the language of the statute, but favors the proposed abandonment. It may be true, as contended, that we have never before permitted an abandonment of service over the protests of the buyer, but here we have a peculiar situation

where one of two great rival natural gas systems is acquired to serve the other. This situation has been subject to our regulatory authority for some time as indicated in our prior order. Up to the present time because of shortage of gas supplies we have been unwilling to permit the abandonment. Now because of Panhandle's increased capacity and the availability of the gas reserved in Docket No. G-2306, *et al.*, abandonment has become feasible, and it is our opinion that each system will more efficiently procure gas supplies and serve its own customers if separated from the other one. Viewing the problem in this way, it is not essential that the American Natural System's gas resources precisely equal its requirements so long as they substantially do so, although we have to say that these resources are indeed sufficient to meet present requirements.

Panhandle's Plan of Distribution

In our order of December 19, 1958, we provided that Panhandle should submit for our approval a plan of allocating the gas presently being delivered to Michigan Consolidated so that such gas will be available for sale for resale primarily to domestic and commercial consumers. Panhandle did file a plan on January 19, 1959. However, the plan so filed is similar to that presented at the hearing and, as we indicated in our prior order, that plan was not satisfactory. The present plan clearly makes no real attempt to meet the standards of our order since it provides increased volumes of gas only for existing eastern Zone customers having a higher percentage of space heating saturation than that obtaining on the Michigan Consolidated System and does now show the portion of the gas that will be made available to domestic and commercial consumers to meet the requirements of the Commission's order that the gas go primarily to these classes of consumers. We shall therefore reject Panhandle's plan but will set a hearing to enable all properly interested parties

to present plans and evidence with respect to the disposition of Panhandle's gas in conformity to the standards of our order of December 19, 1958. In our opinion such parties would include Panhandle's customers and interested state commissions, but not members of the American Natural System or their customers.

Michigan Consolidated's Proposed Settlement

On January 26, 1959, Michigan Consolidated filed a proposal in settlement of the controversy. Under this proposal we would modify our order to provide that Panhandle be authorized to abandon as of October 1, 1959, its present deliveries of 127,000 Mcf per day which are available on the peak days upon condition that on the same date Panhandle commence the delivery to Michigan Consolidated of the same annual volume or 46,355,000 Mcf. This plan, Michigan Consolidated contends, would enable Panhandle to serve 75,000 additional space heating customers and at the same time permit Michigan Consolidated through the use of storage facilities to meet its own requirements. Numerous responses were filed for and against this plan. Among those opposing the plan are many of Panhandle's customers and Panhandle itself. Since the plan of settlement, whatever its virtues, is not acceptable to the parties to these proceedings, and is otherwise inconsistent with our order, it need not be discussed further.

The Commission finds:

The assignments of error and grounds for rehearing in the above applications for rehearing set forth no new facts or principles of law which were not fully considered by the Commission when it adopted its order of December 19, 1958, or which having now been considered warrant any change or modification of said order, except as provided below. Such specifications of error, contentions and arguments contained in the above applications for rehearing

as are not specifically disposed of in the foregoing are without substantial support in evidence or reasonable basis in law or are immaterial to the correct decision of this case and should be denied.

The Commission orders:

(A) The applications for rehearing filed in these proceedings are hereby denied except with respect to the stay granted in (B) below.

(B) The effective date of the abandonment of service permitted Panhandle in paragraph (A) of our order issued December 19, 1958, shall be stayed until a date set in a further order of the Commission.

(C) Michigan Consolidated's request for reopening the record is hereby denied.

(D) Panhandle's motion for leave to file an answer to Michigan Consolidated's request to reopen the record is hereby denied.

(E) Panhandle's plan of allocation of the gas now being delivered to Michigan Consolidated is hereby rejected, and a hearing is hereby fixed to commence at 10:00 A.M. (EDST) on June 16, 1959, in a hearing room of the Federal Power Commission, 441 G Street, N. W., Washington, D. C., to determine an appropriate plan for the allocation of such gas.

By the Commission. Commissioner Kline concurring and filed a separate statement. Commissioner connole dissenting and filed a separate statement.

J. H. Gutride,
Joseph H. Gutride,
Secretary.

[SEAL]

Docket Nos. G 10396, G 10400, G 11061

In the Matters of

AMERICAN LOUISIANA PIPE LINE COMPANY, GULF OIL CORPORATION, PANHANDLE EASTERN PIPE LINE COMPANY

(Issued February 13, 1959)

KLINE, Commissioner, *concurring:*

I concur in the order denying rehearing although I am personally of the view that the public interest would better be served by authorizing a partial abandonment only. There is no question but that there is sufficient evidence in the record to support the decision of the majority. There is an over supply of gas on the American Natural system sufficient, although barely so, to replace the Panhandle gas. There is also a greater and more pressing need for gas generally on the Panhandle system than on the American Natural system.

The difference between myself and the majority is solely in the weight which we give to the various factors affecting the public interest. The majority are of the view that the benefits which will accrue to the public by reason of the complete severance of relations between the two systems outweigh other aspects of the public interest. I am of the opinion that the immediate hardships to the gas consumers in the Detroit area, coupled with the fact that complete abandonment will leave the American Natural system only with enough gas to serve its existing customers and will not permit it to extend service to communities in its service area which have been waiting for years for the gas, make it more in the public interest to authorize only a partial abandonment of the service. This matter has been thoroughly discussed, and careful consideration given to the various views. Since the difference between myself and my colleagues is purely one of judgment and of how much weight should be accorded to the various factors which comprise the public interest,

and there being no question that it is very much in the public interest to sever the relations between these two systems, there is no advantage to be gained by further reconsideration of this matter.

The recently filed proposal of Michigan Consolidated may or may not provide a better solution to this case. We cannot consider the proposal as a settlement proposal because it has not been agreed to by any of the other parties in the case. Neither can we consider it on its merits without affording the other parties an opportunity to be heard. This would result in a delay of at least one or two years. There must be some end to this litigation. This is a case where the public interest requires that some decision be reached in order that the two systems may proceed to make plans for the future. Action, not further groping for some other solution that may or may not be better, best serves the public interest.

ARTHUR KLINE,
Commissioner.

Docket Nos. G-10396, G-10400 and G-11061

In the Matters of

AMERICAN LOUISIANA PIPE LINE COMPANY, GULF OIL CORPORATION, PANHANDLE EASTERN PIPE LINE COMPANY

(Issued February 13, 1959)

CONNOLLY, Commissioner, *dissenting* to denial of reconsideration:

By this order any possibility has been removed that some of Panhandle's capacity and volumes will be used by Michigan Consolidated as part of the allocation order ultimately issued by this Commission. If the record were presently in the same shape as it was when we permitted abandonment I would have no difference with this position. I see nothing in the petition for reconsideration filed by

any party which alters the validity of the reasons on which we relied in permitting abandonment.

While I do not disagree with what we decided before on the record as it was at that time, there has been a material change since the issuance of that order which in my judgment should be given more consideration than the majority order permits. On January 26 of this year, Michigan Consolidated filed a proposal pursuant to 1.18 (e) of the Commission's rules. Majority have concluded that this proposed amendment "need not be discussed further" and that the parties who shall be permitted to present plans and evidence with respect to the disposition of Panhandle's gas would not include "members of the American Natural System or their customers."

There are probably many defects in Michigan Consolidated's proposed plan of settlement. I do not unequivocably accept it. On the other hand there are indisputable advantages. The point is that it was not before us at the time we considered abandonment, it has received the support of many parties, both public and private, to this proceeding and yet we here foreclose our opportunity to consider it. In my judgment the record in this proceeding should be reopened. Michigan Consolidated and other parties supporting the proposed compromise settlement should be permitted an opportunity of justifying the settlement and the final order should reflect careful consideration of the record as so expanded. Because majority opinion renders this impossible, I dissent from it.

I do not contend that this order is erroneous as a matter of law. I do say, however, that in my judgment it is not in the highest public interest to prohibit consideration of a solution to so important a problem, even if that solution requires substantial modification.

The proposal of settlement seems to be at least as worthwhile as the plan of allocation proposed by Panhandle and rejected by this order. Moreover, from the language of the objections made to that proposed offer, at least as much

time would be consumed in proceedings to allocate Panhandle's gas, even without American Natural System or its customers as parties, as would be consumed if the allocation proceedings were broad enough to include consideration of the compromise offer of settlement filed by Michigan Consolidated.

I concur in so much of this order that reaffirms our prior order on the record as it was at the time we made the order. I concur in so much of this order that denies approval of the plan of allocation proposed by Panhandle. I dissent from so much of the order that denies reconsideration for the purpose of permitting us to examine the compromise plan of allocation proposed by Michigan Consolidated.

WILLIAM R. CONNOLLY,
Commissioner.

APPENDIX V

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15358

MICHIGAN CONSOLIDATED GAS COMPANY, a corporation,
PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
PANHANDLE EASTERN PIPE LINE COMPANY,
EAST OHIO GAS COMPANY, INTERVENORS

On Petition for Review of Orders of the Federal Power Commission

---

Decided July 11, 1960

Mr. Charles F. Shannon, with whom *Messrs. Stanley M. Morley* and *Richard F. Generelly* were on the brief, for petitioner.

Mr. Robert L. Russell, Assistant General Counsel, Federal Power Commission, with whom *Messrs. Willard W. Gatchell*, General Counsel, Federal Power Commission, *Howard E. Wahrenbrock*, Solicitor, Federal Power Commission, and *Peter H. Schiff*, Attorney, Federal Power Commission, were on the brief, for respondent.

Mr. Raymond N. Shibley, with whom *Mr. G. R. Rathbun* was on the brief, for intervenor Panhandle Eastern Pipe Line Company.

Mr. George C. Williams, of the bar of the Supreme Court of Ohio, *pro hac vice*, by special leave of court, with whom *Messrs. Norman A. Flannigan* and *Melvin*

Richter, were on the brief, for intervenor East Ohio Gas Company.

Before BAZELON, WASHINGTON and BURGER, Circuit Judges.

BAZELON, *Circuit Judge*: This case is an adjunct to *Michigan Consolidated Gas Co. v. Federal Power Comm'n*, No. 14975, decided April 29, 1960. There we set aside orders of the Commission authorizing Panhandle Eastern Pipe Line Company ("Panhandle") to abandon its deliveries of 127,000 thousand cubic feet ("Mcf") of natural gas per day to Michigan Consolidated Gas Company ("Michigan Consolidated"). Michigan Consolidated brought the instant proceedings to review a subsequent order of the Commission approving Panhandle's proposal to distribute 157,000 Mcf of gas among its resale utility customers. The great bulk of this 157,000 Mcf (*i.e.*, 127,000 Mcf) became available to Panhandle as a result of the abandonment. The remaining 30,000 Mcf were made available by an expansion of Panhandle's transmission facilities.

The Commission held a consolidated hearing, from which Michigan Consolidated was excluded, concerning the approval of that expansion and the proposed distribution of the combined 157,000 Mcf. The order here under review allocated the full 157,000 Mcf to resale customers having relatively low space-heating saturations (*i.e.*, relatively great need for the gas) during the five months of peak demand—November through March. During off-peak periods, most of the 30,000 Mcf made available by the expansion was allocated to East Ohio Gas Company, an intervenor here. East Ohio, which has a relatively high saturation and an alternate source of supply, got none of the 157,000 Mcf for winter use, and none of the volum-

[1] *See Michigan Consolidated Gas Co. v. Federal Power Comm'n*, No. 14975, decided April 29, 1960, slip opinion pp. 21-26 & n. 38.

[2] *Id.* at p. 22.

document gas [illegible] the 127,000 Mcf for summer use. We will treat separately the issues raised with respect to the 127,000 Mcf and the 30,000 Mcf.

1. The 127,000 Mcf. Both Michigan Consolidated and the Commission agreed that our opinion in No. 14975, setting aside the abandonment orders, requires that the order in this case, insofar as it pertains to the abandonment gas, also be set aside on the grounds that it is moot. Manifestly, the Commission cannot distribute this gas unless and until abandonment is validly accomplished. But the parties do not agree on the proper interim allocation of this gas. The controversy arises because the Commission's abandonment order took effect pending our consideration of No. 14975.[1] Panhandle has thus terminated its deliveries to Michigan Consolidated and is currently delivering the abandonment gas to its resale customers pursuant to the order here under review.

Michigan Consolidated asks us to direct the Commission to require Panhandle to resume delivery to Michigan Consolidated forthwith. The Commission opposes this request, without stating its reasons, while Panhandle contends that, even though the instant order is set aside, the Commission should be free to maintain the status quo. Cf. *American Broadcasting Co. v. Federal Communications Comm'n*, 89 U.S.App.D.C. 298, 307, 191 F.2d 492, 502 (1951); *Greensboro-High Point Airport Authority v. Civil Aeronautics Board*, 97 U.S.App.D.C. 358, 363, 231 F.2d 517, 522 (1956).

Ordinarily, Michigan Consolidated would be entitled to retain the gas until it is abandoned by a valid order of

[1] Panhandle contends that the order here under review should remain in effect pending final determination of the abandonment. Thus its customers will have use of the gas during the interim period and if abandonment is ultimately approved, a valid order of distribution will already be in effect.

[2] *See Michigan Consolidated Gas Co. v. Federal Power Comm'n*, decided April 29, 1960, slip opinion p. [illegible] n. 3.

the Commission. In allowing the abandonment to take effect, we cautioned the parties that they "acted at their own risk." There is no reason apparent to us why the gas should not be returned to Michigan Consolidated pending final approval of an abandonment. But, as a court, we are not equipped to allocate gas between competing parties. We are not aware, for instance, of all the physical, financial and equitable considerations which may affect the interest of those the Act was intended to protect—the ultimate gas consuming public. Hence we cannot assess where the balance of hardship would lie if the gas is, or is not, returned to Michigan Consolidated pending final Commission determination of the abandonment. To afford the Commission an opportunity to make such a determination, we will vacate the Commission's order of distribution and remand the case for this purpose. We think that the Commission will be free, upon such a determination, to take action which includes, but need not be limited to, the following: (1) maintaining the status quo; (2) returning all of the gas to Michigan Consolidated; or (3) ordering some division of the gas between Michigan Consolidated and Panhandle, such as the one suggested by Michigan Consolidated's settlement proposal. Michigan Consolidated's legitimate interest in having the Commission reach such determination "with all deliberate speed"[1] is adequately protected by its right to seek mandamus.

It is unnecessary to discuss petitioner's other contentions concerning the designation of a new hearing ex

Ibid.

[1] "Any hardship Panhandle and its utility customers may sustain is, we think, irrelevant, for they acted 'at their own risk'" in attaching new leads pending disposition of the appeal in No. 14975. *See Michigan Consolidated Gas Co. v. Federal Communications Comm'n*, No. 14975, decided April 29, 1960, slip opinion p. 8 n. 3.

Addison v. Holly Hill Co., 322 U. S. 607, 619 (1944).

manner, and its right to intervene in the hearing insofar as it pertained to the abandonment gas.

2. *The 30,000 Mcf.* Michigan Consolidated has also sought review of the Commission's orders (1) excluding it from the proceedings concerning this expansion gas, and (2) authorizing the *distribution* of the gas to East Ohio and Panhandle's other resale customers. (Michigan Consolidated urges no objections to the *authorization* of this increased capacity.) Only the order denying intervention is properly before us. *Public Service Comm'n. v. Federal Power Comm'n.*, No. 15365, *et al.*, decided April 28, 1960.

The Commission denied intervention on alternate grounds that: (1) Michigan Consolidated is not "an 'existing utility customer' of Panhandle," (2) the public interest would not be served since Michigan Consolidated has an adequate supply of gas, and (3) Michigan Consolidated will suffer no immediate economic injury through competition with Panhandle for industrial markets since Panhandle will have to seek Commission approval for any such sale. In its petition for rehearing, Michigan Consolidated asserted that the Commission's ruling was in error because (1) the possibilities of competition entitled it to intervene *as of right*, and (2) intervention was necessary to protect its right of review in No. 14975.

Since the rehearing petition did not assert that the Commission erred in denying intervention on the ground that Michigan Consolidated was not an existing customer of Panhandle, we cannot consider that claim here. Section 19 of the Natural Gas Act, 52 Stat. 831 (1938), 15 U.S.C. 717r(b) (1958); *Federal Power Comm'n. v. Colorado Interstate Gas Co.*, 348 U.S. 492 (1958).

We think Michigan Consolidated had no right to intervene with respect to the 30,000 Mcf to protect its right of review in No. 14975. The two proceedings were con-

[1] See *Michigan Consolidated Gas Co. v. Federal Power Comm'n.*, No. 14975, decided April 29, 1960, slip opinion pp. 26-27.

solidated only for the purpose of administrative convenience. The fact that the gas made available by the expansion was distributed in a manner similar to that made by the abandonment does not make the expansion gas "part and parcel of the abandonment case" as Michigan Consolidated claims. It may be that Panhandle would have proposed or the Commission approved a different plan of distribution for the 30,000 Mcf had they not believed that the 127,000 Mcf were also available. But even if this were true, and the Commission denies it, we do not think that such a possibility gave Michigan Consolidated the right to intervene. Other customers on the Panhandle system might be aggrieved by the large volume of off-peak gas which East Ohio received under the Commission's order, but absent a request under 7(a) and (e) to compel service, we do not perceive any basis for allowing Michigan Consolidated to intervene.

On the remaining ground for intervention—economic injury through industrial competition—we think Michigan Consolidated fares no better. It did not object to the authorization of this increased capacity and Panhandle did not propose to sell any of this gas to industrial customers. To make such sales at some future time, Panhandle must obtain a certificate of public convenience from the Commission. If the grant of such certificate would adversely affect Michigan Consolidated as a competitor, it will have ample opportunity to intervene at that time. *National Coal Ass'n v. Federal Power Comm'n*, 89 U.S.App.D.C. 135, 191 F.2d 462 (1953).

So ordered.

APPENDIX VI

[illegible]

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole, Arthur Kline, and John B. Laskey.

Docket Nos. G-16690, G-16690, G-18061 and G-18144

In the Matters of

AMERICAN LOUISIANA PIPE LINE COMPANY, OHIO RIVER COMPANY, PANHANDLE EASTERN PIPE LINE COMPANY, OHIO ASSOCIATES, INTERLOCKING DIRECTORATES, PANHANDLE EASTERN

(Issued July 16, 1959)

On June 16, 1959, the presiding examiner issued his initial decision herein under subsections (c) and (e) of Section 7 of the Natural Gas Act recommending the issuance to Panhandle Eastern Pipe Line Company of a certificate of public convenience and necessity approving its plan of allocation of 127,000 Mcf per day of natural gas made available to it by its being permitted to abandon service to Michigan Consolidated Gas Company in a prior order of the Commission, *Panhandle Eastern Pipe Line Co. et al.*, 20 FPC 851, a certificate approving the modification and operation by Panhandle of its compressor station engines as described in Docket No. G-18144, and a certificate authorizing Panhandle to allocate the 20,000 Mcf per day of additional capacity made available in Docket No. G-18144. Exceptions to the presiding examiner's decision were filed by the County of Wayne, Michigan, on June 26, 1959. We have considered the record, the preceding examiner's decision, and the exceptions and do not see that the County of Wayne is in any way aggrieved by the decision, but even if it should be assumed that it comes within the category of an aggrieved party, we see no reason to disturb the discussion or determinations made by the presiding examiner except with respect to the

effective date of the allocation of the gas made available by the abandonment of service. We shall therefore affirm his initial decision with the additional comments below relating to the exceptions and a provision as to effective date.

The County of Wayne, which includes the City of Detroit, was properly a party to the proceedings leading up to our order of December 19, 1968, permitting Panhandle to abandon service to Michigan Consolidated. It was clearly a party "aggrieved" by our order, within the meaning of Section 19 of the Natural Gas Act, and was privileged to file a petition for review in the appropriate United States Court of Appeals, as it did, but it has no proper interest in the disposition of Panhandle's gas made available by the abandonment proceeding any more than has Michigan Consolidated or other members of the American Natural System, whom we said were not proper parties to the proceedings relating to the disposition of Panhandle's gas. *American Louisiana Pipe Line Co. et al.*, 21 F.P.C. 218, 227.

Turning to its exceptions, Wayne County contends that the designation of presiding examiner Frazee to preside at the hearings of May 18 and 19, 1969, instead of presiding examiner Ivins constituted a violation of Section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 554, Section 1.8(a) providing that "The same officers who preside at the reception of evidence pursuant to Section 7 shall make the recommended decision or initial decision required by Section 8, except where such officers become unavailable to the agency." However, the County of Wayne overlooks the last sentence in the subsection providing in part as follows: "This subsection shall not apply in determin-

In similar cases it has been held that while objections could be made to the issuance of certificate of public convenience and necessity, no party was aggrieved by the conditions in the order. *Louisiana Consumers Gas Co. v. FPC*, 111 F. 2d 281, 284 (CA 5)

the applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers."

Wayne County points out that our December 19, 1968 order provides in paragraph (B) that Panhandle's plan of allocation with respect to the 127,000 Mcf of gas should result in the gas being "available for sale for resale primarily to domestic and commercial consumers." Wayne contends that the presiding examiner made no finding that the gas would not in fact be sold to industrial consumers and indicates that the record could not support such a conclusion. In our opinion the record, particularly the testimony of Panhandle's witness, indicates that the gas will be resold primarily to domestic and commercial customers as found by the presiding examiner. Although some of the gas sold by Panhandle to the distributing companies may be resold during the summer months for industrial purposes, the primary sale of the gas is for domestic and commercial usage and in substantial compliance with paragraph (B) of our order of December 19, 1968. We agree with the presiding examiner that Panhandle's plan of allocation meets the requirements of our order and are of the opinion that his findings are sufficient.

Wayne County objects to Panhandle's plan to deliver 30,000 Mcf per year of off-peak gas to the East Ohio Gas Company. As the presiding examiner points out, this gas will come entirely from the 30,000 Mcf per year of original capacity made available in Docket No. G-15434 and will not come from the 127,000 Mcf per year formerly delivered to Michigan Consolidated. The record indicates that Panhandle's ratings will not permit this 30,000 Mcf of off peak gas for domestic and commercial consumers, and that if Panhandle is not authorized to deliver it to East Ohio, there will be no market for it except the industrial market. East Ohio plans to inject this gas into its storage fields so that it will be available

to domestic and commercial customers during the winter heating season.

In our order of February 13, 1959, denying applications for rehearing with respect to Panhandle's abandonment of service, we stayed the effective date of the abandonment until a date to be set in a further order. Recently we represented to the United States Court of Appeals for the District of Columbia Circuit that we would not make the abandonment effective until at least 30 days from the issuance of an order allocating the gas made available by the abandonment. We shall therefore make the abandonment and the allocation of the 127,000 Mcf of gas per day formerly delivered to Michigan Consolidated effective at Midnight (EST) the end of the thirtieth day after the day on which this order is issued.

The Commission finds:

(1) Upon consideration of the entire record in these matters, including oral and documentary evidence and the briefs filed before the presiding examiner, the decision of the presiding examiner, and the exceptions thereto, the decision of the presiding examiner issued June 16, 1959, as modified below as to its effective date, should be adopted as the decision of the Commission.

(2) The exceptions filed herein to the decision of the presiding examiner and motion for oral argument should be denied.

The Commission orders:

(A) The decision of the presiding examiner issued herein on June 16, 1959, is hereby adopted, as modified below as to its effective date, and such decision will become the decision of the Commission as of the date of issuance of this order.

(B) The exceptions filed by Wayne County to the decision of the presiding examiner and its motion for oral argument are hereby denied.

(C) The abandonment of service permitted Panhandle in paragraph (A) of our order issued December 29, 1965, and the certificate of public convenience and necessity approving Panhandle's plan of allocation of the gas made available by the abandonment in paragraph (A) of the presiding examiner's decision shall be effective at Midnight (EST) the end of the thirtieth day after the day on which this order is issued.

By the Commission.

Michael J. Farrell,
Acting Secretary.

Docket Nos. G-10296, G-10400, G-11061 and G-18144

In the Matters of

American Louisiana Pipe Line Company, Gulf Refining Company, Panhandle Eastern Pipe Line Company

Kline, Commissioner, *concurring:*

The action of a majority of the Commission in authorizing complete abandonment of service by Panhandle to Michigan Consolidated and in barring Michigan Consolidated from participating in these allocation proceedings is binding upon me. Accordingly, I concur in this order, although I am still of my original view that the public interest would be best served by permitting Michigan Consolidated to receive a portion of this gas.

Arthur Kline,
Commissioner.

APPENDIX VII

PERTINENT STATUTES AND REGULATIONS

Title 15 U.S.C. Section 717r(a) and (b):

"§ 717r. Rehearings; court review of orders

"(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

"(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall

certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to the review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28."

18 Code of Federal Regulations, Section 1.18 (1949):

"1.18 Prehearing conferences; offers of settlement.

"(a) *To adjust or settle proceedings.* In order to provide opportunity for settlement of a pro-

ceeding, or any of the issues therein, there may be held at any time prior to or during hearings before the Commission or a presiding officer designated to preside at conferences or hearings, such informal conferences of parties and staff counsel for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment as time, the nature of the proceeding and the public interest may permit.

"(b) *To expedite hearings.* To expedite the orderly conduct and disposition of any hearing, at such prehearing conferences as may be held, there may be considered, in addition to any offers of settlement or proposals of adjustment, the possibility of the following:

"(1) The simplification of the issues;

"(2) The exchange and acceptance of service of exhibits proposed to be offered in evidence;

"(3) The obtaining of admission as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents which might properly shorten the hearing;

"(4) The limitation of the number of expert witnesses;

"(5) Such other matters as may properly be dealt with and aid in expediting the orderly conduct and disposition of the proceeding.

"(c) *Initiation of conferences.* The Commission with or without motion may direct that a prehearing conference be held. Upon motion by a party or staff counsel timely filed, a presiding officer designated to preside at the hearing or such other officer as may be designated may direct the attorneys for the parties to such proceedings and staff counsel to appear for a prehearing conference to consider the matters outlined in paragraph

(b) of this section. Due notice of the time and place of such conference will be given to all parties to the proceeding and staff counsel.

"(d) *Conference results stipulated.* Upon conclusion of a prehearing conference, attorneys for the parties and staff counsel shall immediately reduce the results thereof to the form of a written stipulation which recites the matters agreed upon, and 10 copies thereof shall forthwith be filed with the Commission by the presiding officer of such conference. Such stipulations may be received in evidence at a hearing and, when so received, shall be binding on the parties and staff counsel with respect to the matters therein stipulated.

"(e) *Offers of settlement.* Nothing contained in this section shall be construed as precluding any party to a proceeding from submitting at any time offers of settlement or proposals of adjustment to all parties and to the Commission (or to staff counsel for transmittal to the Commission), or from requesting conferences for such purpose. Unaccepted proposals of settlement or of adjustment or as to procedure to be followed and proposed stipulations not agreed to shall be privileged and shall not be admissible in evidence against any counsel or person claiming such privilege."

18 Code of Federal Regulations, Section 1.133 (1949):

"1.133 Reopening proceedings.

"(a) *Method of reopening.* (1) *By parties.* At any time after the conclusion of a hearing in a proceeding or adjournment thereof sine die, but before entering and issuance by the Commission of a final order or rule, any party to the proceeding or staff counsel may file with the Commission a petition to reopen the proceeding for the purpose of taking additional evidence. Such petition shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding.

including material changes of fact or of law alleged to have occurred since the conclusion of the hearing, and shall in all other respects conform as applicable to the requirements of §§ 1.7 and 1.15 to 1.17, inclusive.

"(2) *By the Commission on its own initiative.* If, after the hearing in a proceeding, the Commission shall have reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of such proceeding, the Commission will issue an order for the reopening of the same.

"(b) *Petitions to reopen.* (1) *Notice.* Upon the filing by any party or staff counsel of such petition for the reopening of a proceeding appropriate notice will be given any participants, or their attorneys of record who may not have been served with a copy of the petition.

"(2) *Responses.* Within 10 days following the service of such petition or notice thereof, any other party to the proceeding or staff counsel may file with the Commission his answer thereto, and in default thereof shall be deemed to have waived any objection to the granting of such petition.

"(3) *Commission action.* As soon as practicable after the filing of responses to such petitions or default thereof, as the case may be, the Commission will grant or deny such petition."

[1] Code of Federal Regulations, Section 1.1 [illegible].

"1.34 Application for rehearing.

"(a) *Form, filing, and service.* An application for rehearing of a proceeding may be filed within 30 days after the issuance of any final decision or order by the Commission. Such application shall

is made by petition, under oath, stating specifically the grounds relied upon, shall be filed with the Commission and served by the petitioner upon all parties to the proceeding or their attorneys of record, and shall in all other respects conform to the requirements of §§ 1.7 and 1.15 to 1.17, inclusive.

"(b) *Specification of errors.* Such petitions for rehearing shall state concisely the alleged errors in the Commission decision or order. If an order of the Commission is sought to be vacated, reversed, or modified by reason of matters that have arisen since the hearing and decision or order, or by reason of a consequence that would result from compliance therewith, the matters relied upon by the petitioner shall be set forth in the petition.

"(c) *Action on.* Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application shall be deemed to have been denied."

APPENDIX VIII

(Filed April 29, 1960)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959

No. 14,975

MICHIGAN CONSOLIDATED GAS COMPANY, a corporation,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent,*

PANHANDLE EASTERN PIPE LINE COMPANY, MICHIGAN GAS UTILITIES COMPANY, ET AL., CENTRAL ILLINOIS LIGHT COMPANY, MICHIGAN GAS STORAGE COMPANY, CITY OF INDIANAPOLIS, INDIANA, NORTHERN INDIANA FUEL & LIGHT CO., SOUTHEASTERN MICHIGAN GAS CO., CITIZENS GAS FUEL COMPANY, MISSOURI POWER & LIGHT COMPANY, MISSOURI PUBLIC SERVICE COMPANY, CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, ILLINOIS POWER COMPANY, ILLINOIS COMMERCE COMMISSION, MISSOURI PUBLIC SERVICE COMMISSION, PUBLIC SERVICE COMMISSION OF INDIANA, INDIANA GAS & WATER COMPANY, INC., *Intervenors.*

No. 14,976

MICHIGAN WISCONSIN PIPE LINE COMPANY, a corporation,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent,*

PANHANDLE EASTERN PIPE LINE COMPANY, MISSOURI PUBLIC SERVICE COMPANY, CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, *Intervenors.*

No. 14,977

AMERICAN LOUISIANA PIPE LINE COMPANY, a corporation, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

PANHANDLE EASTERN PIPE LINE COMPANY, MISSOURI PUBLIC SERVICE COMPANY, CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, *Intervenors*.

No. 15,061

COUNTY OF WAYNE, MICHIGAN, a municipal corporation and body politic, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

PANHANDLE EASTERN PIPE LINE COMPANY, *Intervenor*.

No. 15,065

MILWAUKEE GAS LIGHT COMPANY, a corporation, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

PANHANDLE EASTERN PIPE LINE COMPANY, *Intervenor*.

No. 15,070.

WISCONSIN FUEL AND LIGHT COMPANY, ET AL., *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

PANHANDLE EASTERN PIPE LINE COMPANY, *Intervenor*.

No. 15,073

NATURAL GAS DISTRIBUTORS, INC., a corporation, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

PANHANDLE EASTERN PIPE LINE COMPANY, *Intervenor*.

No. 15,074

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN, *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

PANHANDLE EASTERN PIPE LINE COMPANY, *Intervenor*.

No. 15,077

CITY OF DETROIT, a municipal corporation, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

PANHANDLE EASTERN PIPE LINE COMPANY, *Intervenor*.

No. 15,093

WISCONSIN PUBLIC SERVICE CORPORATION, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

PANHANDLE EASTERN PIPE LINE COMPANY, *Intervenor*.

No. 15,144

MICHIGAN CONSOLIDATED GAS COMPANY, a corporation, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

PANHANDLE EASTERN PIPE LINE COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, MICHIGAN GAS UTILITIES COMPANY, BATTLE CREEK GAS COMPANY, MICHIGAN GAS STORAGE COMPANY, MISSOURI POWER & LIGHT COMPANY, MISSOURI PUBLIC SERVICE COMPANY, ILLINOIS POWER COMPANY, ILLINOIS COMMERCE COMMISSION, MISSOURI PUBLIC SERVICE COMMISSION, INDIANA GAS & WATER COMPANY, INC., *Intervenors*.

On Petitions to Review Orders of the Federal Power Commission

Before: Bazelon, Washington and Burger, Circuit Judges.

Judgment

These cases came on to be heard on the record from the Federal Power Commission, and were argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this court that the orders of the Federal Power Commission on review in these cases (except in No. 15,093) are set aside and that the case on review is remanded to the Federal Power Commission for further proceedings not inconsistent with the opinion of this court.

It is Further Ordered by the court that the petition for review in No. 15,663 is dismissed without prejudice (see footnote 50 to the opinion this day filed in the above-entitled cases).

Per Circuit Judge Bazelon.

APPENDIX IX

(Filed July 11, 1960)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959

No. 14,975

MICHIGAN CONSOLIDATED GAS COMPANY, a corporation,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent.*

PANHANDLE EASTERN PIPE LINE COMPANY, MICHIGAN GAS UTILITIES COMPANY, ET AL., CENTRAL ILLINOIS LIGHT COMPANY, MICHIGAN GAS STORAGE COMPANY, CITY OF INDIANAPOLIS, INDIANA, NORTHERN INDIANA FUEL & LIGHT CO., SOUTHEASTERN MICHIGAN GAS CO., CITIZENS GAS FUEL COMPANY, MISSOURI POWER & LIGHT COMPANY, MISSOURI PUBLIC SERVICE COMPANY, CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, ILLINOIS POWER COMPANY, ILLINOIS COMMERCE COMMISSION, MISSOURI PUBLIC SERVICE COMMISSION, PUBLIC SERVICE COMMISSION OF INDIANA, INDIANA GAS & WATER COMPANY, INC., *Intervenors.*

No. 14,976

MICHIGAN WISCONSIN PIPE LINE COMPANY, a corporation,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent.*

PANHANDLE EASTERN PIPE LINE COMPANY, MISSOURI PUBLIC SERVICE COMPANY, CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, *Intervenors.*

No. 14,977

AMERICAN LOUISIANA PIPE LINE COMPANY, a corporation,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent.*

PANHANDLE EASTERN PIPE LINE COMPANY, MISSOURI PUBLIC SERVICE COMPANY, CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, *Intervenors.*

No. 15,061

COUNTY OF WAYNE, MICHIGAN, a municipal corporation and body politic, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

PANHANDLE EASTERN PIPE LINE COMPANY, *Intervenor*.

No. 15,065

MILWAUKEE GAS LIGHT COMPANY, a corporation, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

PANHANDLE EASTERN PIPE LINE COMPANY, *Intervenor*.

No. 15,070

WISCONSIN FUEL AND LIGHT COMPANY, ET AL., *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

PANHANDLE EASTERN PIPE LINE COMPANY, *Intervenor*.

No. 15,073

NATURAL GAS DISTRIBUTORS, INC., a corporation, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

PANHANDLE EASTERN PIPE LINE COMPANY, *Intervenor*.

No. 15,074

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN, *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

PANHANDLE EASTERN PIPE LINE COMPANY, *Intervenor*.

No. 15,077

City of Detroit, a municipal corporation, *Petitioner*,

v.

Federal Power Commission, *Respondent*,

Panhandle Eastern Pipe Line Company, *Intervenor*.

No. 15,144

Michigan Consolidated Gas Company, a corporation, *Petitioner*,

v.

Federal Power Commission, *Respondent*,

Panhandle Eastern Pipe Line Company, Central Illinois Light Company, Michigan Gas Utilities Company, Battle Creek Gas Company, Michigan Gas Storage Company, Missouri Power & Light Company, Illinois Power Company, Missouri Public Service Company, Illinois Commerce Commission, Missouri Public Service Commission, Indiana Gas & Water Company, Inc., *Intervenors*.

Before: Prettyman, Chief Judge, Edgerton, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

Order

On consideration of the petition of Panhandle Eastern Pipe Line Company for rehearing en banc, it is

Ordered by the court that the petition is denied.

Per Curiam.

Dated: July 11, 1960

APPENDIX X

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959

No. 15,358

MICHIGAN CONSOLIDATED GAS COMPANY, a corporation,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent,*

PANHANDLE EASTERN PIPE LINE COMPANY, EAST OHIO GAS COMPANY, *Intervenors.*

On Petition for Review of Orders of the Federal Power Commission.

Before: Bazelon, Washington and Burger, Circuit Judges.

Judgment

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the Commission denying intervention to Michigan Consolidated Gas Company in the expansion proceedings is affirmed, and that the order of distribution on review in this case is vacated and the case is remanded to the Federal Power Commission for further proceedings consistent with the opinion of this court.

PER CIRCUIT JUDGE BAZELON.

Dated: July 14, 1960.

LE COPY

Office Supreme Court, U.S.
FILED
NOV 7 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 472

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*,

v.

MICHIGAN CONSOLIDATED GAS COMPANY, MICHIGAN WISCONSIN PIPE LINE COMPANY, AMERICAN LOUISIANA PIPE LINE COMPANY, ET AL., *Respondents*.

On Petition for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS, MICHIGAN CONSOLIDATED GAS COMPANY, MICHIGAN WISCONSIN PIPE LINE COMPANY AND AMERICAN LOUISIANA PIPE LINE COMPANY, IN OPPOSITION

CHARLES V. SHANNON
STANLEY M. MORLEY
May, Shannon, and Morley
1700 K Street, N. W.
Washington 6, D. C.

ARTHUR R. SEDER, JR.
Sidley, Austin, Burgess & Smith
11 South LaSalle Street
Chicago 3, Illinois

Attorneys for Respondents Michigan Consolidated Gas Company, Michigan Wisconsin Pipe Line Company and American Louisiana Pipe Line Company.

November 7, 1960

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Questions Presented	2
Statute and Regulations Involved	3
Statement	3
Argument	11
I. The Court of Appeals Had Full Authority To Direct the Commission To Consider the Settlement Proposal Upon Remand	13
II. The Court's Treatment of the "Demand Capacity Ratio" Question Was Entirely Fair and Proper	17
Conclusion	19

CITATIONS

Cases:

American Louisiana Pipe Line Company, et al., Docket Nos. G-10296, et al., 20 F.P.C. 851	2
American Louisiana Pipe Line Company, et al., Docket Nos. G-10396, et al., 21 F.P.C. 218	2
American Louisiana Pipe Line Company, et al., Docket Nos. G-10396, et al., 22 F.P.C. 82	2
American Louisiana Pipe Line Company, Opinion No. 276 (October 1, 1954)	6
Michigan Wisconsin Pipe Line Company, Docket No. G-669, 6 F.P.C. 1 (1947)	5
Michigan Wisconsin Pipe Line Company, Docket No. G-669, 6 F.P.C. 58 (1947)	5
Panhandle Eastern Pipe Line Company v. Federal Power Commission, 169 F. 2d 881 (App. D.C. 1948), cert. den., 335 U.S. 854	5
Panhandle Eastern Pipe Line Company, v. Federal Power Commission, 219 F. 2d 729 (3rd Cir. 1955), cert. den., 349 U.S. 945	6

Page

Panhandle Eastern Pipe Line Company v. Federal Power Commission, 236 F. 2d 289 (1956) 5
Panhandle Eastern Pipe Line Company v. Michigan Public Service Commission, 341 U.S. 329 (1951) .. 4
Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana, 332 U.S. 507 (1947) .. 4
Sun Oil Company v. Federal Power Commission, — U.S. —, 4 L. ed. 2d 1639 5
Sunray Mid-Continent Oil Company v. Federal Power Commission, — U.S. —, 4 L. ed. 2d 1623 5

STATUTES:

Natural Gas Act of 1938 (52 Stat. 821, 15 U.S.C. § 717r) 3
Sec. 7(b) 2, 5, 6
Sec. 19(b) 2, 15

Rules of Practice and Procedure of the Federal Power Commission, 18 C.F.R. Chapter I

Sec. 1.18 ..... 3, 15
Sec. 1.18(c) 8
Sec. 1.32 3
Sec. 1.34 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 472

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*,

v.

MICHIGAN CONSOLIDATED GAS COMPANY, MICHIGAN WISCONSIN PIPE LINE COMPANY, AMERICAN LOUISIANA PIPE LINE COMPANY, ET AL., *Respondents*.

On Petition for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS, MICHIGAN CONSOLIDATED GAS COMPANY, MICHIGAN WISCONSIN PIPE LINE COMPANY AND AMERICAN LOUISIANA PIPE LINE COMPANY, IN OPPOSITION

OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. I, II, V) are not yet officially reported. The opinions and

orders of the Federal Power Commission here involved (Pet. App. III, IV, VI) are reported at 20 F.P.C. 851, 21 F.P.C. 218 and 22 F.P.C. 82.

QUESTIONS PRESENTED

The Federal Power Commission issued an order under Section 7(b) of the Natural Gas Act authorizing Petitioner, an interstate pipeline company, to abandon its deliveries of natural gas to a distribution company on the ground that Petitioner's other customers had a greater need for the gas to serve domestic and space heating loads. The Commission rejected Petitioner's proposed plan of allocating the abandonment gas among its other customers and the Commission directed that a new plan of distribution be submitted which would carry out the stated objectives of the order. Thereafter, by a second order, the Commission denied rehearing; rejected a revised allocation plan filed by Petitioner; refused to consider a "settlement proposal" submitted by the distribution company; and scheduled a further hearing to determine the allocation to be made of the abandonment gas. Following the further hearing, from which the distribution company was excluded, the Commission by a third order approved the third allocation plan filed by Petitioner. The questions are:

(1) Whether the Court below, in setting aside the abandonment order on various grounds, also had jurisdiction, upon a petition for review timely filed under Section 19(b) of the Act, to set aside the second order, which rejected the "settlement proposal" submitted by the distribution company, and to direct that such proposal be considered in the remanded proceedings before the Commission?

(2) Whether, having decided to set aside the abandonment order on several grounds, it was appropriate for the Court below to refrain from passing on the distribution company's objections to the Commission's use of a new abandonment criterion in its order denying rehearing, so that the initial consideration of the objections would be by the Commission in the remanded proceedings?

STATUTE AND REGULATIONS INVOLVED

Pertinent provisions of the Natural Gas Act (52 Stat. 821, 15 U.S.C. § 717r) and the rules of Practice and Procedure of the Federal Power Commission (18 C.F.R. § 1.18, § 1.33, § 1.34) are set forth in Appendix VII to the Petition for Certiorari.

STATEMENT

Petitioner, Panhandle Eastern Pipe Line Company ("Panhandle"), seeks review of a decision of the United States Court of Appeals for the District of Columbia Circuit setting aside certain orders of the Federal Power Commission authorizing Panhandle to abandon service to Michigan Consolidated Gas Company ("Michigan Consolidated") and remanding the cause to the Commission for reconsideration in the light of the Court's opinion. This brief in opposition is submitted by respondents, Michigan Consolidated, Michigan Wisconsin Pipe Line Company ("Michigan Wisconsin") and American Louisiana Pipe Line Company ("American Louisiana").

Michigan Consolidated is a public utility company engaged in the distribution and sale of natural gas in Detroit, Ann Arbor and a number of other cities in Michigan. In 1955 Michigan Consolidated entered into

a contract with Panhandle for the purchase of natural gas. Panhandle owns and operates a pipeline system extending from the Panhandle-Hugoton Field of Texas to northern termini in Michigan and Ohio. As amended and supplemented, the contracts between the parties provided for maximum daily deliveries of 125,000 Mcf at Detroit and 2,000 Mcf per day at Ann Arbor.

During the early 1940's, Michigan Consolidated attempted without success to obtain increased deliveries from Panhandle to meet the rapidly growing market for natural gas in Michigan. However, Panhandle had then embarked upon a program of making direct sales to industries located in the service areas of its distribution company customers. Such sales are not subject to regulation as to price under the Natural Gas Act, and Panhandle saw an opportunity thereby to make profits in excess of those permitted for its regulated operations.[1]

Desiring to take over Michigan Consolidated's industrial customers in the Detroit area, Panhandle refused to increase its deliveries to Michigan Consolidated.[2] Faced with this intolerable situation, Michigan Consolidated's parent, American Natural Gas Company, organized Michigan Wisconsin to bring new supplies to the gas-starved midwest area. While Panhandle vigorously opposed Michigan Wisconsin's application for a certificate, claiming a vested right to remain the sole supplier of natural gas in Detroit, the Commission found that public convenience and necessity required

[1] See *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U.S. 507, 509, fn. 3 (1947).

[2] See *Panhandle Eastern Pipe Line Company* v. *Michigan Public Service Commission*, 341 U.S. 329, 333-36 (1951).

the issuance of a certificate to Michigan Wisconsin. However, the Commission specifically recognized and preserved Panhandle's right to participate in the future growth of Detroit and Ann Arbor markets.[3]

Michigan Wisconsin's line was constructed in 1948 and 1949 and its capacity doubled by 1950. In that year, Panhandle began its campaign to reduce and ultimately to abandon service to Michigan Consolidated. After undertaking to cancel its contracts with Michigan Consolidated, which had been filed with the Commission as rate schedules following the enactment of the Natural Gas Act in 1938, Panhandle filed an application with the Commission under Section 7(b) of the Act to reduce its deliveries to Michigan Consolidated at Detroit from 125,000 Mcf to 87,500 Mcf per day. Panhandle's application was denied by the Commission and in affirming that order the United States Court of Appeals for the Third Circuit found that Panhandle's principal argument was "so wholly lacking in merit as to border on the frivolous." *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, 236 F. 2d 289, 293 (1956).[4]

---

[3] *Michigan Wisconsin Pipe Line Company, et al.*, 6 F.P.C. 1 (1947); 6 F.P.C. 58 (1947), affirmed, *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, 169 F. 2d 881 (App. D.C. 1948), *cert. den.* 335 U.S. 854.

[4] Last term this Court had occasion to emphasize the continuing obligation of a natural gas company to render service after termination of its contract obligation. *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, ... U.S. ...., 4 L. ed. 2d 1623; *Sun Oil Company* v. *Federal Power Commission*, ... U.S. ...., 4 L. ed. 2d 1639. This Court was divided as to whether that obligation extended to producers but was unanimous with respect to the continuing obligation of a pipeline company. See 4 L. ed. 2d at 1643-6.

Faced with the rapidly increasing needs of the markets in Michigan and Wisconsin and Panhandle's continued refusal to provide any additional supplies, American Natural in 1953 organized its second major pipeline, American Louisiana, with an initial capacity of 300,000 Mcf per day. Again, Panhandle resisted the issuance of a certificate, but again the Commission found that public convenience and necessity required the issuance of a certificate to American Louisiana to meet a "crying demand" for the gas.[5] Even before completing construction of the line, American Louisiana applied in May of 1956 for authority to expand the capacity of its pipeline by 100,000 Mcf per day.

Once more Panhandle intervened in opposition to American Louisiana's certificate application, this time coupling its petition to intervene with an application under Section 7(b) of the Act to abandon entirely its service to Michigan Consolidated. In its abandonment application, Panhandle emphasized the shortages of gas in the markets it serves as compared with those served by the American Natural system and based its request on the allegedly greater needs of its customers other than Michigan Consolidated for gas to meet domestic and space heating requirements.[6] However,

[5] *American Louisiana Pipe Line Company*, Opinion No. 276 (October 1, 1954), affirmed, *Panhandle Eastern Pipe Line Company v. Federal Power Commission*, 219 F. 2d 729 (3rd Cir. 1955), *cert. den.*, 349 U.S. 945.

[6] The shortage of gas in the areas served by Panhandle has admittedly resulted from its long-standing refusal to expand its pipeline capacity. This refusal, in turn, results from Panhandle's dissatisfaction with the regulatory framework in which it must operate under the Natural Gas Act. The Commission and the Court below both recognized that "Panhandle's failure to expand implements its deliberate aim to avoid the Commission's rate regulations". Pet. App. 6a.

the hearings clearly developed the fact that, while Panhandle's other customers had considerable need for additional gas during the winter to attach additional space heating loads, they had little use for additional gas during the summer.

On the other hand, Michigan Consolidated, which operates large underground storage fields, had for many years been purchasing 127,000 Mcf from Panhandle every day of the year, storing the gas purchased during the summer for winter use. By abandoning all service to Michigan Consolidated, Panhandle would thus have available large volumes of summer or "off-peak" capacity which its other customers could not use and which would then be available for direct sales to industry at unregulated prices. As the Court below noted, "There are strong indications that one of Panhandle's primary purposes in seeking abandonment is to shift gas from regulated to unregulated sales" (Pet. App. 6a).[7]

After extended hearings, the Presiding Examiner who had heard the evidence issued a decision denying Panhandle's application to abandon service to Michigan Consolidated. However, the Commission, one member not participating and another favoring only partial abandonment, issued a decision and order on December 19, 1958, reversing the Examiner and authorizing Panhandle to abandon service to Michigan Consolidated (Pet. App. 38a-52a).

The Commission based its decision principally upon a comparison of space heating saturations. By com-

[7] Panhandle's abandonment application had itself stated that one of the purposes of abandonment would be to permit Panhandle to compete with Michigan Consolidated for industrial sales in Detroit (R. 1656).

paring the average space heating saturations of Panhandle's customers (excluding two customers with very high saturations), the Commission concluded that Panhandle's customers had greater need for the gas than did Michigan Consolidated and accordingly granted the abandonment. However, the Commission recognized that Panhandle's proposed plan of allocation of the abandonment gas would have resulted in making a portion of the gas available for sale by Panhandle directly to industries. The Commission's order therefore directed Panhandle within 30 days to file a new allocation plan that would "provide that the gas should be sold for resale primarily to domestic and commercial consumers" (Pet. App. 50a).

Michigan Consolidated and numerous other parties filed timely applications for rehearing. Shortly thereafter, Panhandle filed its revised plan of allocation of the abandonment gas in response to the direction in the Commission's order of December 19, 1958. Analysis of that plan showed immediately that it was subject to the same defects as the plan previously rejected by the Commission. Like the first plan, Panhandle's second proposal would have made a large portion of the abandonment gas available for direct industrial sales by Panhandle rather than distributing the gas to its utility customers for resale "primarily to domestic and commercial consumers" and was thus inconsistent with the abandonment order.

Accordingly, Michigan Consolidated, in an effort to avoid further controversy and litigation, filed a "Proposal Under Section 1.18(c) of the Commission's Rules of Practice and Procedure." The basis of the proposal was the fact that, while Panhandle's other customers

needed the additional winter deliveries the abandonment gas would provide, they simply could not use the full volumes of abandonment gas during off-peak, summer periods, whereas Michigan Consolidated could readily do so.

Michigan Consolidated therefore proposed to purchase the same *annual* volumes from Panhandle as before but to do so during off-peak periods, utilizing its underground storage fields to store the gas for winter use. Michigan Consolidated would then relinquish its right to deliveries during peak winter periods so as to make the 127,000 Mcf per day of capacity available for Panhandle's other customers for domestic and commercial uses. This proposal was based upon and was in full accord with the announced objective of the Commission's order of December 19, 1958.[2]

On February 13, 1959,[3] the Commission issued an order which (1) denied all applications for rehearing; (2) refused to consider Michigan Consolidated's settlement proposal "whatever its virtues" because it was not acceptable to Panhandle and some of its customers;[4] and (3) rejected Panhandle's revised plan of allocation on the ground that it "makes no real attempt to meet the standards of our order" (Pet. App. 70a-

[2] In submitting its settlement proposal Michigan Consolidated did not waive the position it had taken in its application for rehearing of the December 19, 1958 order and its right to seek review of that order, in the event the Commission did not act favorably on the proposal (R. 1899).

[3] Commissioner Connole dissented from this conclusion, while Commissioner Kline reiterated his view that only a partial abandonment should have been permitted but concurred in the rejection of the proposal (Pet. App. 73a-76a). Commissioner Hussey did not participate. Thus, ultimately, only two of the five commissioners favored total abandonment.

71a). The Commission thereupon stayed the effective date for the abandonment of service and set a hearing for June 16, 1959 "to determine an appropriate plan for the allocation of such gas" (*Id.*, 72a). However, the Commission stated that the members of the American Natural system and their customers, including Michigan Consolidated, would not be permitted to participate in that hearing (*Id.*, 71a).

Michigan Consolidated filed an application for rehearing of the February 13, 1959 order and filed timely petitions to review that order (No. 15,344 below) as well as the December 19, 1958 abandonment order (No. 14,975 below).

In the meantime, Panhandle had filed a third proposed plan of allocation of the abandonment gas. While this plan was subject to the same defects as Panhandle's two earlier plans, it was approved by the Commission's order of July 16, 1959 (Pet. App. 83a-87a) after an abbreviated two day hearing, from which Michigan Consolidated was excluded, upon the hearsay testimony of Panhandle's sales manager that he had been assured by its customers that "virtually all" of the abandonment gas would be purchased for resale primarily to domestic and commercial consumers (R. 1343a-s).[10] After applying for rehearing, Michigan Consolidated filed a petition for review of that order (No. 15,358 below).

---

[10] In an order issued September 21, 1960, directing Panhandle to resume deliveries to Michigan Consolidated on an interim basis following remand by the Court of Appeals, the Commission found, as Michigan Consolidated had predicted, that the abandonment had resulted in the availability to Panhandle of substantial volumes of off-peak gas which its utility customers could not use

On April 29, 1960 the Court below issued the first of its three opinions in which it set aside (in No. 14,975) the abandonment order of December 19, 1958 on a number of separate grounds and remanded the cause to the Commission for further consideration in the light of the Court's opinion. The Court also set aside (in No. 15,144) the February 13, 1959 order which had rejected Michigan Consolidated's "settlement proposal", and the Court stated that the Commission should consider that proposal on its merits in the remanded proceedings (Pet. App. 1a-33a).

On July 11, 1960 the Court issued a supplemental opinion in which it discussed and rejected the contentions advanced in the Commission's petition for modification of the opinion and rehearing and in Panhandle's petition for rehearing (Pet. App. 34a-37a).[1] On the same day the Court issued a separate opinion (in No. 15,358) setting aside the July 16, 1959 order insofar as that order allocated the 127,000 Mcf per day of abandonment gas (Pet. App. 77a-82a).

Panhandle now seeks certiorari to review two points in the Court's decision, both of which were correctly decided upon the facts of the case and neither of which, in any event, would effect in the slightest the lower Court's disposition of the case.

ARGUMENT

Panhandle asserts two grounds for the issuance of a writ of certiorari: (1) that the conclusion of the Court below that the Commission should have considered Michigan Consolidated's settlement proposal was er-

[1] Panhandle's petition for rehearing *en banc* was denied by the full Court (Pet. App. 38a).

roneous and should be reviewed in the exercise of this Court's supervisory powers over lower courts; and (2) that the Court of Appeals erred in referring back to the Commission for its initial consideration the objections that had been raised by Michigan Consolidated to the Commission's use of a so-called "capacity-demand ratio" test in its February 13, 1959 order denying rehearing. Panhandle does not even claim a conflict of decisions, nor is there the faintest indication that any substantial or important question is presented under the Natural Gas Act. The petition represents nothing more than the usual predisposition of a disappointed litigant to seek further review in this Court of an adverse decision.

Before turning specifically to the points raised by Panhandle, we should point out that the Court of Appeals' reversal of the abandonment order was based upon a number of grounds, only two of which are involved in Panhandle's petition. While fully recognizing the limitations upon its review of administrative action, the Court found that the Commission had seriously prejudiced the interests of Michigan Wisconsin's customers by failing to consider their needs in applying the test of relative space heating saturations (Pet. App. 18a-22a); that the Commission did not satisfactorily explain or justify its decision to authorize abandonment on the basis of system-wide averages, rather than the needs of specific communities (*Id.*, 22a-23a); that the Commission's action in appropriating, in

[12] In its Statement of the Case Panhandle makes intemperate and captious criticisms of the Court's conclusion in this respect (Pet. 10-11), but since the petition for certiorari does not claim error or seek review on that account, it is unnecessary to point out the invalidity of Panhandle's statements.

this proceeding, gas that had been reserved for other customers in a separate and unrelated proceeding raised serious questions of due process which did not have to be decided because of the remand for further proceedings (*Id.*, 27a-28a); and that the Commission's conclusions regarding the alleged advantages of separation of the Panhandle and Michigan Consolidated systems were not supported by adequate findings (*Id.*, 29a-32a). None of these points is challenged by Panhandle and each requires remand and further proceedings before the Commission.

Thus, the effect of further review in this Court would be merely to delay the effective resolution of this matter, which is even now before the Commission for its determination upon the remand. And the effect of a decision that the Commission could not consider Michigan Consolidated's settlement proposal upon the remand would be to prevent consideration of a proposal which, as the Court below pointed out, "promises to fulfill the Commission's announced objectives of distributing gas to this consuming public on the basis of need, even more fully than total abandonment" (*Id.*, 33a). The absurd practical consequences of the relief sought by Panhandle simply emphasize the error in its legal position, which we shall now briefly consider.

I.

THE COURT OF APPEALS HAD FULL AUTHORITY TO DIRECT THE COMMISSION TO CONSIDER THE SETTLEMENT PROPOSAL UPON REMAND

Panhandle's contention that neither the Commission nor the Court of Appeals had jurisdiction to consider Michigan Consolidated's settlement proposal completely misconstrues the basis of the Court's action and the Commission's authority under the Natural Gas Act.

In the first place, the settlement proposal did not seek rehearing or reconsideration of the Commission's December 19, 1958 abandonment order. On the contrary, the settlement proposal expressly accepted as its premise the two propositions upon which that order was founded: (1) that based upon relative space heating saturations Panhandle's customers needed the gas more than Michigan Consolidated during peak periods in the winter; and (2) that the abandonment gas must be sold for resale (i.e., to utility customers rather than direct sale industrial customers) primarily for domestic and commercial uses. The settlement proposal, by providing for the relinquishment of winter gas to Panhandle's other customers and the delivery of off-peak gas to Michigan Consolidated for injection into its storage fields and subsequent sale to its space heating customers provided a feasible means for accomplishing both of those objectives.

In the second place, the proposal was made at an entirely appropriate and timely point. The December 19, 1958 abandonment order had just been issued, setting forth the standards which were to govern the distribution of the abandonment gas and rejecting Panhandle's first plan for allocation of the abandonment gas as inconsistent with those standards. Panhandle had then filed a revised allocation plan that "clearly makes no real attempt to meet the standards of [the abandonment] order" (Pet. App. 70a). It was thus obvious that further proceedings would be required to determine the appropriate distribution of the abandonment gas in light of the standards of the abandonment order, as the Commission itself subsequently held.

It was in light of these circumstances, and with specific reference to the standards of the abandonment

order that Michigan Consolidated submitted its settlement proposal. The Commission's Rules of Practice and Procedure provide that such a proposal may be made "at any time." (18 C.F.R. § 1.18). The matter of distributing the abandonment gas was then before the Commission for consideration. Indeed, in the very order of February 13, 1959 rejecting the settlement proposal the Commission set a hearing

> "* * * to enable all properly interested parties to present plans and evidence with respect to the disposition of Panhandle's gas in conformity with the standards of our order of December 19, 1958" (Pet. App. 70a-71a).

However, Michigan Consolidated, the only party to have formulated such a proposal, was specifically excluded from the proceeding and its proposal rejected "whatever its virtues" (Pet. App. 71a).

In sum, Michigan Consolidated's settlement proposal was not an attack upon the Commission's December 19, 1958 abandonment order and did not constitute an "objection to the order of the Commission" which must be urged in an application for rehearing under Section 19(b) of the Act.[7] Quite the contrary, the settlement proposal was expressly based upon the standards of the abandonment order and proposed a method of distribution of the abandonment gas in accordance with those standards (Pet. App. 33a).

The question of the distribution of the abandonment gas was admittedly before the Commission having been

[7] As previously stated, Michigan Consolidated filed a timely application for rehearing in which it set forth its objections to the December 19, 1958 order and those were the grounds upon which it subsequently sought review of that order.

postponed for future decision by the abandonment order itself. Hearings were subsequently held on that very matter. The Commission was clearly in a position to consider the merits of Michigan Consolidated's settlement proposal.

The Commission's action with respect to the settlement proposal was also properly before the Court of Appeals. The order rejecting that proposal out of hand was issued on February 13, 1959 (Pet App. 53a-76a). Within thirty days Michigan Consolidated filed an application for rehearing of that order with the Commission and after rejection of that application filed a petition to review with respect thereto in the Court of Appeals (No. 15,144) and the Commission itself conceded with respect to this matter that "petitioner properly invokes this court's jurisdiction under Section 19 of the Natural Gas Act" (Pet. App. 35a-36a).

Panhandle hardly pretends that the question here presented is a broad or recurring one. The Court of Appeals held only that "* * * in the special circumstances of this case, the Commission erred in brushing aside the settlement proposal" (Pet. App. 36a). Panhandle itself states that the question it asks this Court to decide is "whether the Federal Power Commission is required to consider a 'settlement proposal' *in the circumstances of this case*" (Pet. 12, italics supplied). Obviously, a determination of that question by this Court could extend no farther than the complicated and unusual facts of this case.

II.

THE COURT'S TREATMENT OF THE "DEMAND-CAPACITY RATIO" QUESTION WAS ENTIRELY FAIR AND PROPER

Panhandle urges as its second point that the Court below erred in concluding that it need not pass on objections raised by Michigan Consolidated to a so-called "demand-capacity ratio" test, which was first referred to by the Commission in its February 13, 1959 order denying rehearing on the abandonment order of December 19, 1958 (Pet. 18-20). Since the Court below refrained from passing upon the objections in order "to allow initial consideration [of the objections] by the Commission" (Pet. App. 24a), Panhandle's argument on this point is difficult to fathom.

In its abandonment order of December 19, 1958, the Commission had placed principal emphasis upon comparative space heating saturations as the basis for its determination of the comparative needs of Michigan Consolidated and Panhandle's other customers for additional gas. The comparison of space heating saturations was referred to as an "objective way to approach this problem" (Pet. App. 49a), and the Commission's December 19, 1958 order was based upon a finding that:

> "The lesser saturation on the systems of the customers dependent entirely on Panhandle service shows that Panhandle's gas can be used to greater advantage on the systems of these customers than by Michigan Consolidated" (Pet. App. 50a).

In their petitions for rehearing, Michigan Consolidated and other parties pointed out a number of respects in which the Commission had incorrectly ap-

plied the test of relative space heating saturations. In its February 13, 1959 order denying rehearing the Commission, after briefly noting these objections, undertook to compare the peak day capacities and peak day demands on the two systems. However, while the ratio of capacity to demand on Panhandle's system was found to be lower than on the American Natural system, the Commission made no specific finding and reached no specific conclusion with respect thereto (Pet. App. 57a-60a).

In the Court of Appeals Michigan Consolidated and other parties strongly objected to this aspect of the Commission's order, pointing out that it was based upon information taken from other cases to which they were not parties and upon evidence not subjected to cross-examination. They also emphasized the fact that the use of such a "test" for abandonment had never been suggested by anyone at any time and that it appeared for the first time in the Commission's order denying rehearing, thus precluding the parties from any opportunity to meet or rebut the matters relied upon by the Commission.

The Court of Appeals found it unnecessary to rule on these objections. In view of the invalidity of the Commission's comparison of space heating saturations and the necessity for further proceedings upon remand, the Court concluded that the Commission should be given the opportunity to consider the objections to the capacity-demand comparison in the first instance (Pet. App. 24a).

Panhandle treats the Court's action as if it were a broad refusal to give effect to alternative findings made by an agency upon rehearing. Of course, it was

nothing of the kind. The principal basis of the Commission's original decision was the comparison of space heating saturations. Since the Commission improperly applied its principal criterion of comparative space heating saturations, and remand of the cause was necessary for that and other reasons, the Court's refusal to consider the objections to the use of the demand-capacity ratio was the essence of sound judicial discretion.

The Court's action was the antithesis of the "mechanistic approach" attributed to it by Panhandle (Pet. 19). Certainly the Court could not assume that the Commission would simply discard its space heating saturation test in favor of the demand-capacity ratio criterion, if, upon a proper comparison of space heating saturations, a contrary result was indicated.[14] It was therefore not only appropriate but essential that both criteria be reconsidered by the Commission upon the remand.

CONCLUSION

The petition for certiorari involves no conflict of decisions, no question of statutory interpretation, no important question of administrative law and no judicial action even remotely justifying the exercise of this Court's supervisory powers. The Court below carefully considered the difficult and complex record in this case, and rendered a decision that gives full effect to the Commission's prerogatives, the rights of the

[14] That this was a very real possibility, if the space heating saturations of Michigan Wisconsin's other customers were considered in the comparison, as they must be, was demonstrated by the Court below (Pet. App. 20a-21a).

parties, and most importantly the public interest. The petition for certiorari should be denied.

Respectfully submitted,

CHARLES V. SHANNON
STANLEY M. MORLEY
May, Shannon, and Morley
1700 K Street, N. W.
Washington 6, D. C.

ARTHUR R. SEDER, JR.
Sidley, Austin, Burgess & Smith
11 South LaSalle Street
Chicago 3, Illinois

Attorneys for Respondents Michigan Consolidated Gas Company, Michigan Wisconsin Pipe Line Company and American Louisiana Pipe Line Company

November 7, 1960

Supreme Court of the United States

REPLY BRIEF FOR PETITIONER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 472

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*

v.

MICHIGAN CONSOLIDATED GAS COMPANY,
MICHIGAN WISCONSIN PIPE LINE COMPANY,
AMERICAN LOUISIANA PIPE LINE COMPANY,
COUNTY OF WAYNE, MICHIGAN,
MILWAUKEE GAS LIGHT COMPANY,
WISCONSIN FUEL AND LIGHT COMPANY,
NATIONAL GAS DISTRIBUTORS, INC.,
STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN,
CITY OF DETROIT,
WISCONSIN PUBLIC SERVICE CORPORATION,

Respondents

REPLY BRIEF FOR PETITIONER

The single brief in opposition, filed by the American Natural Gas Company's wholly-owned subsidiaries, urges that the unprecedented action of the court below should not be examined on certiorari

by this Court because of the "special circumstances" of this case. In this, Respondents are mistaken, because the issues presented relate to jurisdictional questions, the recurrence of which is assured by the action of the court below.

There is no circumstance in this case which could justify the court below in requiring the Federal Power Commission to act in a manner which exceeds the Commission's jurisdictional powers. There is also no circumstance in this case which could justify the court below in exceeding its own statutory jurisdiction. And, there is no circumstance unique to this case which can preclude administrative agencies generally from being restrained in the same fashion by these respondents, now that the new technique has been sanctioned by the court below.

Clearly, there is no limitation on the general applicability of the holding of the court below that the Commission's finding as to the crucial issue of "greater need" for gas, even though "unassailable", need not be given effect by a reviewing court solely because it had been advanced in a rehearing order, "after the Commission's original decision" (Pet. App. 24a).

Equally general in nature is the ruling of the court below that, despite specific statutory restrictions upon the time within which an issue can be raised on rehearing of an agency order, the agency may nevertheless be reversed for failing to deal exhaustively with an untimely request for drastic modification of its final order.

The generality of these departures from traditional observance of jurisdictional limitations is signalled by the concluding paragraph of the July 11, 1963 opinion

of the court below, which summarizes the matter in the following terms (Pet. App. 57a):

> "Where, as here, a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration. These limits are not to be confused with the narrower ones governing review of an agency's conclusions reached upon proper consideration of the relevant factors."

This undisguised attack on the expertise of the Commission sanctions a judicial review sufficiently elastic to authorize the nullification of any agency action that does not precisely accord with the particular views of a panel of the Court of Appeals. In this case the judicial review appears "broad" enough to hurdle even jurisdictional limits imposed by Congress. Thus, the sweeping nature of the court's rulings can in no sense be limited to the "special circumstances" of this case.

Respondent's brief in opposition makes no real attempt to defend the basis upon which the court below disregarded the jurisdictional limitation upon the time within which an issue must be presented to the Commission on rehearing. Respondents argue instead that their untimely proposal, which the court below has now ordered the Commission to set for hearing, "was not an attack upon the Commission's December 19, 1958 abandonment order and did not constitute an 'objection to the order of the Commission' which must be urged in an application for rehearing under Section 19(b) of the Act." (Resp. Br. 15).

The invalidity of this argument is readily apparent. The controlling paragraph of the Commission's December 19, 1958 order provided that:

> "(A) Panhandle is hereby permitted to abandon service to Michigan Consolidated and any facilities used to effect such service on March 15, 1959" (Pet. App. 52a).

As opposed to this, Respondent's untimely settlement proposal, specifically called upon the Commission to "*modify* its order of December 19, 1958 to provide as follows":

> "(A) Panhandle is hereby permitted to abandon its deliveries of 127,000 Mcf per day to Michigan Consolidated under Panhandle's S-3 Rate Schedule on October 1, 1959, subject to the condition that Panhandle on October 1, 1959 commences the delivery to Michigan Consolidated of 46,355,000 Mcf per year under Panhandle's S-3 Rate Schedule pursuant to a service agreement which will be prescribed by further order of the Commission following the hearing hereinafter ordered." (J. App. 2379).

Since the entire quantity of gas that Panhandle formerly delivered to Michigan Consolidated amounted to 46,355,000 Mcf per year, all of which was ordered abandoned, it is obvious that Michigan Consolidated's proposal to "modify" the order to require continuation of deliveries in the exact amount of 46,355,000 Mcf per year was, in fact, as complete an attack upon the Commission's order as may be imagined. Since this attack was admittedly not filed with the Commission within the statutory thirty-day period, it could not serve as a ground for the Commission to "abrogate or modify its order," within the contemplation of

Section 19(a) of the Natural Gas Act. Nor could it, because of the prohibition in Section 19(b) of the Act, properly be considered by the court below.

With regard to the other basis upon which the Commission has been directed to conduct further hearings, namely the question of "greater need," Respondents simply beg the question presented by Petitioner. The fact that the court below was not persuaded by the comparative "space heating saturation" test which the Commission discussed in its original order does not constitute justification for disregarding the independent "capacity-demand" test on which the Commission's order on rehearing was based.

Moreover, Respondents now accept the premise "that based upon relative space heating saturations Panhandle's customers needed the gas more than Michigan Consolidated during peak periods in the winter" (Res. Br. 11). Accordingly, it is impossible to see how they can at the same time urge that the greater need of the Panhandle customers was not sufficiently demonstrated.

Finally, Respondents argue that the grant of certiorari "would be merely to delay the effective

[1] Respondents further argue that the "proposal" was intended to comply with the Commission's request for submission of plans for the distribution of the abandonment gas among Panhandle's customers. (Res. Br. 15). Clearly, this was not the fact, because no gas could have been made available to Panhandle's customers under the Michigan Consolidated proposal since it proposed to resell the entire 16,555,000 Mcf available for distribution and instead of proposing a plan for distribution among the various Panhandle customers, Michigan Consolidated's pleading merely stated that "This, of course, is a matter for the Commission to consider." J. App. 237).

resolution of this matter, which is even now before the Commission for its determination upon the remand" (Res. Br. 13). This is misleading. The exact status of the matter is that (1) Panhandle is delivering no gas to Michigan Consolidated since all of the gas is being supplied to the Panhandle customers which were found by the Commission to have the greater need, and (2) no hearings have been held, or even scheduled, by the Commission.

The need for further hearings would be completely eliminated if this Court were to grant certiorari and subsequently rule in Petitioner's favor on the specific points raised.

The record already contains complete data with respect to space heating saturations, as Michigan Consolidated itself admits (J. App. 2380). The competitive claim for service to the so-called "new communities" in Wisconsin is now academic, inasmuch as that service was commenced earlier this year from gas which the American Natural system obtained from new sources in Canada. And, with regard to the need for subsidiary findings to support the Commission's conclusion as to the advantages of separating the two systems, the court below specifically recognized that the Commission "may have an expert's knowledge that does not require evidence in the record that each system will be more efficient and stronger after abandonment" (Pet. App. 31a).

[1] It must be emphasized that the proceedings before the Commission required 94 days of hearings, during which the transcript of testimony alone reached 20,000 pages, with hundreds of exhibits and thousands of pages of pleadings. Unless modified, the orders of the court below would require retracing of this entire process.

The proper resolution of the issues presented in this Court will, therefore, lead to an expeditious conclusion of this litigation, which affects the gas supplies of consumers in a large segment of the midwest, extending from Kansas to Ohio. It will also avoid perpetuation of the far-reaching impact upon the administrative process of the rulings of the court below.

Respectfully submitted.

RAYMOND N. SHIBLEY
Patterson, Belknap & Farmer
1120 Connecticut Avenue, N.W.
Washington 6, D. C.

G. R. RIBBING
Baker & Daniels
810 Fletcher Trust Building
Indianapolis 4, Indiana

Attorneys for Panhandle Eastern Pipe Line Company, Petitioner